91-294

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LESLIE ROBERT STELLMAN,
Counsel of Record
for Petitioner,
JOHN W. KYLE,
LITTLER, MENDELSON, FASTIFF & TICHY,
The World Trade Center, Suite 1653,
Baltimore, Maryland 21202-3005,
WALTER H. RYLAND,
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS,
Two James Center,
1021 East Carey Street,
Richmond, Virginia 23210-1320.

August 19, 1991

The Daily Record Company
11 East Saratoga Street, Baltimore, MD 21202—(301) 752-3849

I

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court of Appeals have dismissed Petitioner's case as moot because, during the pendency of Petitioner's appeal from the District Court's dismissal, on standing grounds, of its constitutional challenge to the provisions of the Maryland Annotated Code, State Finance and Procurement Article §§ 14-301 et seq. (herein the Minority Business Enterprise or "MBE" statute), that state's legislature repealed and reenacted the challenged statute with facial modifications?

2. Should the Court of Appeals have rendered an opinion finding that Petitioner lacked standing to initiate this litigation, while at the same time vacating the District Court's opinion and order to the same effect and remanding the case with

directions to dismiss on mootness grounds under United States v. Munsingwear, 340 U.S. 36 (1950)?

3. Were the facts set forth in a letter incorporated into deposition testimony offered by the Respondent sufficient to defeat its Motion for Summary Judgment on standing?

4. Does the Petitioner Association lack standing under the third prong of the representational standing test set forth in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), to attack the constitutionality of the Maryland MBE statute, because certain of Petitioner's members are MBEs within the meaning of the statute and may utilize its provisions to their economic advantage?

5. Is the personal stake necessary for representational standing under Article III of the Constitution and the first prong

of the Hunt test to challenge the maintenance of the Maryland MBE statute met by a showing that the allegedly unconstitutional subcontracting provisions of the statute are imposed directly upon Petitioner's members, impede their right to operate their business free from arbitrary governmental restraints, and subject them to the threat of liability for participation in state-sponsored racial discrimination?

II

LIST OF PARTIES TO PROCEEDING BELOW

Plaintiff

The Maryland Highways Contractors Association, Inc.

Defendants

State of Maryland

James J. McGinty, Secretary, Board of Public Works

Earl F. Seboda, Secretary, Department of General Services

Richard H. Trainor, Secretary, Department of Transportation

Joseph I. Shilling, Chairman, Interagency Committee on School Construction

Henry L. Hein, Chairman, Maryland Food Center Authority

Herbert J. Belgrad, Chairman, Maryland Stadium Authority

John S. Toll, Chancellor, The University of Maryland System

Charles L. Benton, Director, Department of Budget and Fiscal Planning

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Regulations

Other Sources

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

V

OPINIONS BELOW

The District Court opinion was issued on June 19, 1990 and is unreported. The opinion is reproduced in the appendix to this petition at App. A-30. The Court of Appeals' opinion is reported at 933 F.2d 1246 (4th Cir. 1991), and is also reproduced in the appendix at App. A-1.

VI

JURISDICTION OF THIS COURT

The Court of Appeals' opinion in this matter was rendered on May 20, 1991, and this petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. § 1254(1)(1991).

VII

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provision

Amendment XIV, Constitution of the United States:

> Section 1. Citizens of the United States.
>
> * * *
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes

a. 42 U.S.C. § 2000d (1981). Nondiscrimination in federally assisted programs.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

b. 42 U.S.C. § 1983 (1981).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United states or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Maryland Statutes and Regulations

The provisions of Md. State Fin. & Proc. Code Ann. §§ 14-301 through 14-303 (1985), as well as the relevant provisions of Title 21 of the Code of Maryland Regulations (COMAR) are lengthy and are reproduced at App. A-71.

VIII

STATEMENT OF THE CASE

Petitioner Maryland Highway Contractors Association, Inc. initiated this action in August 1989 in the United States District Court for the District of Maryland. Petitioner sought, inter alia, a declaratory judgment that certain provisions of the Maryland Minority Business Enterprise (MBE) statute, Md. State Fin. & Proc. Code Ann. § 14-301 et seq. (1985), constituted a scheme of impermissible race discrimination, violative of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 and 42 U.S.C. § 2000d. In its Complaint, Petitioner relied upon this Court's opinion in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and its holding that before a state may put in place a program of racial classification in

procurement it must first have a strong evidentiary basis for concluding that racial discrimination has occurred in State contracting programs and that a scheme of racial preference is necessary to remedy such discrimination.

On September 6, 1989, Respondent requested leave to postpone its response to Petitioner's Motion for Preliminary Injunction until further order of the Court, pending discovery in connection with Respondent's allegation that Petitioner lacked standing to bring the lawsuit. The District Court granted the request, with the result that the requested discovery, in the form of interrogatories and requests for production of documents, was begun concurrently by Respondent.

Petitioner served its responses to Respondent's discovery requests on October 10, 1989. In the interim, Respondent,

through the Maryland Department of Transportation, had published a solicitation in which it sought an independent consultant capable of performing a "Minority Business Utilization Study" to review and evaluate Respondent's MBE programs. The solicitation noted that time was of the essence, that an expedited method of procurement had been approved, and that the resulting study was to be completed not later than January 1, 1990.

Following service of Petitioner's answers to Respondent's interrogatories and document requests, Respondent noticed the deposition of Petitioner's Executive Director, Robert E. Latham. Mr. Latham's deposition took place on October 31, 1989, and on November 21, 1989, Respondent moved for summary judgment on a number of issues of justiciability, including Petitioner's alleged lack of standing to sue. Peti-

tioner opposed the motion in responsive papers filed with the Court.

A hearing, limited by order of the Court to the standing issue, was held before the District Court on February 7, 1990. Following the hearing, during the time that the Court had the matter under advisement, the General Assembly of Maryland relying, in part, upon the aforementioned study of the State's MBE programs, repealed and reenacted the MBE statute with certain amendments to become effective on July 1, 1990 (App. A-71-79).

On June 19, 1990, the District Court dismissed the Petitioner's Complaint for want of standing. During the pendency of Petitioner's appeal of that dismissal, the revisions to the Maryland MBE law had become effective, and the parties advanced their legal arguments on mootness, as well as their arguments on the standing issue to

the United States Court of Appeals for the Fourth Circuit.

On May 20, 1991, the Court of Appeals issued its opinion finding that the changes that had been made in 1990 to the Maryland MBE statute rendered this case moot. The Court reasoned that the case was moot because the statute challenged by the Association no longer existed and the Court did not have before it sufficient facts to determine whether "someone" had been injured by the "new" statute (App. A-12). The Court rejected sub silentio, Petitioner's suggestion that if it were concerned about possible mootness, the appropriate procedure under the very cases of this Court cited by the Respondent[1/] would be to remand the case to the District Court

---

1/ Diffenderfer v. Cent. Baptist Church, 404 U.S. 412, 415 (1972)(per curiam); Fusari v. Sternberg, 419 U.S. 379 (1975).

for further proceedings. Instead, the Court of Appeals, relying upon United States v. Munsingwear, 340 U.S. 36, 39 (1950), and the general practice referred to therein of dealing with cases mooted on appeal, vacated the judgment below and remanded the case to the District Court with a direction to dismiss.

IX

REASONS FOR ALLOWANCE OF THE WRIT

A. Certiorari Should Be Granted Because The Decision Of The Court Of Appeals Conflicts With Opinions Of This Court And Of Other Courts Of Appeals.

1. The Court Of Appeals Misapplied The Standards Set Forth In The Opinions Of This Court For Determining When Intervening Legislative Action Renders Moot A Constitutional Challenge To State Statutory Provisions And What Disposition Is Appropriate Upon A Finding Of Mootness.

This Court has said both that the burden of demonstrating that federal jurisdiction should abate because of mootness

"is a heavy one," and that voluntary cessation of alleged illegal conduct does not render a case moot. United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953). Nevertheless, in County of Los Angeles v. Davis, 440 U.S. 625 (1979), this Court recognized that there may be circumstances in which a case becomes moot because interim relief or events have eradicated the effects of the violation complained of and there is no reasonable expectation that the alleged violation will recur. Davis, 440 U.S. at 631.

In the context of challenges to State statutory provisions, this Court held in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982), that a controversy over certain language in a city ordinance was not rendered moot by the intervening repeal of that language, in circumstances

where the city had indicated an intention to reenact the objectionable language.

Similarly, in Johnson v. Board of Education of the City of Chicago, 457 U.S. 52, 54 (1982), this Court refused to find moot a controversy over the defendant school board's use of racial quotas, even in circumstances where the board had initially abandoned the challenged quotas before readopting them pursuant to a scheme of racial balancing approved under the terms of a consent degree, which the school board contended had "eliminated or reduced any discriminatory effects of the quotas." 457 U.S. at 54.

Thus, mootness is not shown under the decided cases simply because the circumstances originally before the Court may have changed. Rather, what is necessary for a finding of mootness is a showing by the moving party that a case has been

overtaken by events such that it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Diffenderfer v. Cent. Baptist Church, 404 U.S. 412, 414 (1972) (per curiam), quoting Hall v. Beals, 396 U.S. 45, 48 (1969).

Here, the controversy between the parties concerned whether the State had complied with the requisites of Croson before establishing a requirement that contractors on state projects agree to subcontract 10% of the work to subcontractors of particular races. The revised statute professed to have achieved compliance with Croson but in substance did no more than delete Alaskan Natives and Pacific Islanders from the definition of minority. The Court of Appeals concluded that this change produced a "new" law and

rendered moot the Petitioner's challenge to the "old" law, but the Court did not discuss in what way the revisions to the law demonstrated that the underlying controversy between the parties had abated. Instead, what the Court spoke of was the absence of information or evidence bearing on the operation of the new statute (App. A-12-13). When read in conjunction with its earlier comments, the Court appears to have said that this case is moot simply because the face of the Maryland statute now states that there has been an intervening attempt to comply with Croson, even though no evidence was introduced to support that claim, beyond the language of the statute itself.

The Court of Appeals' finding not only ignores the standard for mootness set out in this Court's cases, it also ignores the "heavy burden" placed upon the respondent

under Davis to adduce evidence to support its mootness claim, a burden that was not met by the Respondent here.

a. Other Circuits.

Further, the Court of Appeals' willingness to summarily render a factual determination on the basis of a facial review of statutory provisions is inconsistent with post-Croson precedent in other circuits suggesting that the adequacy of the factual predicate for race-conscious policies in public contracting needs to be adjudicated on the underlying facts rather than on assumptions as to the facial implications of the statute. See Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), cert. denied, 111 S. Ct. 516 (1990). Cone involved a challenge to a program on facts essentially similar to those at issue here, and essentially similar to the facts in Croson. The Eleventh Circuit held that

the District Court had improperly granted summary judgment to the plaintiff on the basis of a facial review of the statute, without looking behind the language to examine the operation of the law.

A recent decision in the Ninth Circuit concerned the asserted mootness caused by subsequent legislative amendment of an MBE statute. In Coral Construction Co. v. King County, No. 90-35066 (9th Cir. Aug. 8, 1991) (LEXIS 17784), the court held that, since the constitutionality of the original law had yet to be determined, it would remand the issue of mootness to the district court for consideration. Id. at 20, slip op. at 51.

b. Prior Decisions of This Court.

The Court of Appeals also misread established precedent of this Court bearing on the effect of intervening legislative changes. In finding the absence of record

evidence determinative of the mootness issue, the Court of Appeals appeared to be relying on language from this Court's opinion in Fusari, 419 U.S. at 387, which suggested that appellate review should not take place when the Court is "unable meaningfully to assess the issues" because of intervening changes (App. A-12).[2/] What the Court of Appeals failed to appreciate,

---

[2/] In Fusari, the plaintiff complained that delays in State eligibility determinations for unemployment compensation violated constitutional and statutory requirements. In the course of proceedings before this Court, the State subsequently revised and streamlined its administrative procedures with the result that, by the time of the Court's opinion, these revised procedures had been in effect for over six months. Noting that it was required to examine the then-current law and that "both the statutory and constitutional questions are significantly affected by the length of the period of deprivation of benefits," the Court found itself unable to rule on the revised administrative scheme, saying that it could "only speculate how the new system might operate." 419 U.S. at 388-389.

however, was that Fusari is not a mootness case in the nature of Davis or City of Mesquite. Indeed, the result in Fusari was not dismissal of the action as moot but remand for reconsideration in light of the intervening changes in law. 419 U.S. at 390.

Similarly, the Court of Appeals erred in relying upon Diffenderfer v. Central Baptist Church, supra, and Hall v. Beals, supra, as support for its mootness finding. In Diffenderfer the challenge was to a Florida statute authorizing a tax exemption for church property used as a commercial parking lot. In the course of the appeal, the Florida Legislature amended the statute to treat church property as tax exempt only if used predominately for religious purposes, thus adopting the plaintiff's position.

In Hall v. Beals, the plaintiffs' interest in challenging the State's six-month voting eligibility requirement was vitiated by legislative amendments reducing that requirement to two months -- a standard that the plaintiffs would have satisfied at the time they initiated the suit. In these circumstances, said the Court, the case had lost its status as a present, live controversy between the parties.

The common thread in these cases is that intervening legislative action made unnecessary or nondispositive resolution of the issue urged on the then-existing record. In contrast, where the issues in a plaintiff's complaint remain viable disputes, both legally and factually, notwithstanding intervening legislative action, the Court is still in a position to grant meaningful relief to the plaintiff by deciding the questions raised below.

In the instant case, the Petitioner's challenge to the Maryland MBE statute focused principally upon the language of three provisions of that statute: Sections 14-301 through 14-303. Petitioner's Complaint maintained that these provisions and their implementing regulations constituted a scheme of racial classification in state contracting activities such that a minimum of 10% of the dollar value of state procurement was to be targeted for award to MBE subcontractors through a program of mandatory compliance efforts by prime contractors on state projects.

Petitioner further asserted that under this Court's opinion in Croson, the Maryland MBE statute constituted impermissible racial discrimination because: 1) the history of the MBE statute indicated that the program was enacted for the purpose of increasing MBE participation in state

contracting; 2) there was insufficient evidence of prior discrimination in State contracting activities to justify imposition of the program under federal law, and 3) the program was not narrowly tailored to correct identified discrimination because selection of the 10% target figure was wholly arbitrary, the program was unlimited in duration, the program included within the definition of MBEs individuals (Alaskan Natives, Pacific Islanders and American Indians) who could not be shown to have even been available in significant numbers to participate in Maryland State contracting, and the State had failed to give genuine consideration to non-race-conscious or less intrusive remedies for discrimination -- examples of which were included in Petitioner's Complaint -- before enacting its MBE program.

When the Maryland General Assembly considered amendments to its MBE legislation in 1990, it repealed and reenacted the statute, making only one change relevant to Petitioner's claims concerning the language of §§ 14-301 through 14-303 of the MBE statute: the deletion of Alaskan Natives and Pacific Islanders from the list of those qualified to be MBEs. Otherwise, each of the provisions in §§ 14-301 through 14-303 cited by Petitioner's Complaint was reenacted without change and a 10% subcontracting target continued to exist for the participation of Hispanics, Blacks, Asians and American Indians.

Thus, the allegedly unconstitutional racial preferences originally complained of by Petitioner continued unabated, except that certain racial minorities could no longer qualify for MBE status, and the scheme of mandatory contractor compliance

originally complained of continued exactly as it had existed before.

Further, even if the Court of Appeals entertained some genuine doubt as to whether the issues in Petitioner's original lawsuit should be thought to have survived the intervening changes by the Maryland Legislature, the appropriate procedure under the opinions of this Court would have been to remand the case for possible amendment of the Complaint, not to dismiss the action. As this Court recently said in Lewis v. Continental Bank Corp., 494 U.S. 472, 110 S. Ct. 1249, 1256 (1990):

> [I]n instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.

Given the Court of Appeals' express recognition that it did not "have enough facts before [it] in this case to evaluate the new statute in light of Croson" (App. A-13), one would have thought that the Court would have been inclined to remand the case even independent of this well-established Supreme Court authority.[3/]

Instead the Court of Appeals vacated the District Court's order and remanded for dismissal, relying upon the line of cases headed by United States v. Munsingwear, 340 U.S. 36, 39 (1950), wherein this Court reversed and vacated the judgment below on the ground of mootness, directing that the complaint be dismissed. However, Munsingwear is inapposite because of the absence

---

3/ In addition to the result in Fusari, Petitioner's brief to the Court of appeals directed it as well to the result in Diffenderfer, 404 U.S. at 415 (remanding with leave to amend to show that the "repealed statute retains some continuing force").

in this case of mootness. Moreover, given that the argument on mootness arises in this case in the context of intervening legislative changes, even the underlying philosophy of Munsingwear is inconsistent with the Court of Appeals' decision to vacate the District Court's order on standing but nevertheless "address the issue of standing in order to guide subsequent litigation" (App. A-14) (whereupon the Court of Appeals essentially adopted the lower court's standing analysis).

Thus, Munsingwear concerned itself with fairness to the parties to a moot controversy and the need to vacate an existing judgment in order to avoid needlessly prejudicing the parties' future rights and interests:

> That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that proce-

> dure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

340 U.S. at 40.

In contrast to the result in Munsingwear, the Court of Appeals' action here has placed the present case in a posture in which the Court has, on the one hand, ordered Petitioner's case dismissed as moot, and on the other, effectively precluded Petitioner from filing a new complaint against the modified MBE statute.[4/]

[4/] As we discuss below, the Court of Appeals found that a conflict of interest among its members and a lack of demonstrated harm prevented the Petitioner from having standing to challenge the MBE statute. Whether that finding is viewed as persuasive dicta, as a matter governed by stare decisis or as the law of the case, the District Court should be expected to apply the Court of Appeals' analysis to dismiss Petitioner's Complaint should it now file against the amended statute. See 1.B Moore's Federal
(continued...)

Moreover, the automatic rule of dismissal that the Court of Appeals has imposed here under Munsingwear would, in the context of constitutional challenges to State legislation, both under this Court's Croson opinion and in other circumstances, undermine the important role served by "private attorneys general" in advancing the interests embodied in federal civil rights statutes[5/] by subjecting plaintiffs to dismissal any time that a legislative

---

[4/](...continued)
Practice ¶ 0.402[2] at 42-45 (2d ed. 1991).

[5/] In its recent opinion in Texas State Teachers Ass'n v. Garland Indep. School Dist., ___ U.S. ___, 109 S. Ct. 1486, 1494 (1989), this Court reaffirmed the important role served by the presence of private attorneys general in the prosecution of civil rights litigation.

body purports to review and make saving amendments to challenged legislation.[6/]

As a result, states and municipalities defending statutes or ordinances from constitutional attack will be in a position to litigate through the point of resolution

---

[6/] The rule of dismissal adopted by the Court of Appeals will also do substantial harm to the purposes served by the attorneys' fees provisions of 42 U.S.C. § 1988, by preventing a plaintiff in these circumstances from contending that it should be viewed as a "prevailing party." Thus, while a civil rights plaintiff may be entitled to recover fees where repeal of a legislative provision effectively constitutes capitulation by the defendant, see Associated Builders & Contractors of La. v. Orleans Parish School Bd., 919 F.2d 374 (5th Cir. 1990), the mandatory dismissal of a plaintiff's complaint, where a state or municipality opts to revise and defend its statute, will make it virtually impossible for a plaintiff to make the showing necessary for recovery of fees, i.e., that the intervening legislative actions have changed "the legal relationship between itself and the defendant," Hewitt v. Helms, 402 U.S. 755, 760-761 (1987), such that it may be viewed to be a prevailing party.

by the trial court yet subsequently defeat federal jurisdiction by the simple expedient of revising the face of the legislation during the pendency of appeal. A plaintiff's case would then be found moot and its complaint dismissed with the result that the plaintiff would be required to retrace its steps if it wished to obtain the very relief that was sought in the original complaint and not realized by virtue of the intervening state action. Such a wholesale grant to public defendants of the ability to manipulate federal jurisdiction should not be sanctioned by this Court.

B. Certiorari Should Be Granted Because In Ruling That The Association Lacked Standing To Challenge The Constitutionality Of A Statute Because Some Of Its Members Stood To Benefit From The Statute, The Court Decided An Important Question Of Federal Law That Has Not Been, And Should Be, Decided By This Court.

In ruling that as a matter of law the Association lacked standing to sue because some of its members were minority contractors who stood to benefit from the challenged legislation, the Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this Court. The Court of Appeals has rendered a decision that means that no large organization can maintain standing to sue on behalf of its members because there will always be someone with a conflict. Moreover, the Court has made this ruling on a point on which neither party presented evidence. The trial court did not rule on it.

In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), this Court set out a three-part test governing representational standing for organizations.[7/] Relying upon its vision of Hunt, the Court of Appeals concluded in the instant case that the Petitioner failed to meet parts 1 and 3 of the test and set out its reasoning on the matter "in order to guide subsequent litigation."

The Court of Appeals erroneously found that there were "actual" conflicts of interest among the members of the Petitioner such that under the third prong of the

---

[7/] Under Hunt, an organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests of the organization seek to protect one germane to the organization's purpose; and (3) neither the claim nor the relief sought require the participation of individual members in the lawsuit. Id. at 343.

Hunt test, it was necessary for Petitioner's members to come forward individually in this matter (App. A-27). In so doing, the Court relied primarily upon the opinion of the Eighth Circuit in Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979), where associational standing was denied in the context of a Sherman Act challenge to a private construction agreement limiting participation on the project to unionized subcontractors. Because the plaintiff association in Otter Tail was composed of both union and nonunion contractors, the Eighth Circuit found their status and interests too diverse and the possibility of conflict too obvious to allow the association to litigate the claims of its members. The Court noted in the latter regard that some of the association's contractor members would not, or

could not, work on the project, while others would participate and would stand to profit from such participation. Id. at 690-691.

The rationale of Otter Tail is in conflict with relevant opinions in other Circuits. For example, in National Collegiate Athletic Association v. Califano, 622 F.2d 1382, 1391-92 (10th Cir. 1980), the Court examined the issue of associational standing in the context of an athletic association's challenge to government regulations designed to foster sexual equality of opportunity in intercollegiate sports programs. The NCAA's standing to sue under Hunt was questioned because, inter alia, "[m]any of the colleges who belong to the NCAA also belong to a women's intercollegiate sports association, the AIAW, which is on the other side of the litigation." 622 F.2d at 1391. The Tenth

Circuit resolved the issue by finding that the association had standing absent a showing that a majority of its members opposed the objective of the lawsuit. In language of particular relevance here, the Court rejected the notion that the members' differing views of the issue required their individual participation in the lawsuit, stating:

> The appellees have contended that this lawsuit requires the individual participation of the members of the NCAA. Such an objection, if well taken, defeats standing of an association. Warth v. Seldin, 422 U.S. at 515-516. However, the contention is not well taken here. The NCAA must prove facts conferring standing with respect to at least one of its members (cf. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 114 (1979)), but otherwise the case presents issues of law common to all members. No damages are sought for the individual members. The NCAA asks for declaratory and injunctive relief, and "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association

actually injured." Warth v. Seldin, 422 U.S. at 515; cf. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. at 344.

Indeed, the language of the Tenth Circuit in NCAA v. Califano anticipated the holding of this Court in United Auto Workers Union v. Brock, 477 U.S. 274 (1986). In Brock, the plaintiff union sought declaratory and injunctive relief to bar the implementation of a Department of Labor regulation which the union claimed unlawfully penalized those of its members who were applicants for certain supplemental unemployment insurance benefits under the Trade Act of 1974. The union alleged that the Department of Labor's policy of not crediting employees for eligibility purposes with time spent by them in military service was inconsistent with the mandate of veterans' rights legislation and resulted, in some cases, in the erroneous denial of members' claims.

The Court of Appeals had dismissed the case, saying that the union was not an appropriate representative because union members had differing interests and each of the adversely affected members presented an individualized claim that had to be dealt with separately. 746 F.2d 839, 842 (D.C. Cir. 1984). This Court reversed, stating:

> [T]he Court of Appeals misconstrued the nature of petitioner's claims. Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions.

This Court went on in UAW v. Brock to reject the Secretary of Labor's suggestion that it reconsider Hunt and the principles of associational standing set out there. Specifically, the Secretary had urged the Court to reject associational standing in cases where there is no guarantee that the

associational plaintiff adequately represents the interests of all of its membership. This Court declined the invitation in language that has been interpreted to mean that mere diversity of member interests is insufficient to destroy associational standing:[8/]

> We are not prepared to dismiss out of hand the Secretary's concern that associations allowed to proceed under Hunt will not always be able to represent adequately the interests of all their injured members. Should an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles. And were we presented with evidence that such a problem existed

---

8/ See Nat'l Maritime Union of America v. Commander, Military Sealift Command, 824 F.2d 1228, 1233 (D.C. Cir. 1987) ("We conclude for a number of reasons that associational standing does not necessarily depend upon harmony of member interests. The first of these reasons is the very good one that we think the Supreme Court has decided the question," citing Brock).

> either here or in cases of this type, we would have to consider how it might be alleviated. However, the Secretary has given us absolutely no reason to doubt the ability of the UAW to proceed here on behalf of its aggrieved members, and his presentation has fallen far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing.

477 U.S. at 290 (citations omitted).

In light of this Court's holding in Brock, the Court of Appeals' willingness to nevertheless follow the earlier opinion in Otter Tail underscores the disagreement in the circuits as to the application of the third prong of the Hunt test in circumstances where the individual interests of association members may be viewed as divergent.[9/] See also Mich. Road Builders

---

[9/] The Fourth, Seventh and Eighth Circuits have adopted the position that harmony of member interests is required for associational standing. See, in addition to Otter Tail and the opinion below, Calvin v. Conlisk, (continued...)

Ass'n v. Blanchard, 761 F. Supp. 1303, 1312 (W.D. Mich. 1991) (association which had previously litigated the constitutionality of MBE statute before this Court now held to lack standing because it admits MBEs to membership).

Moreover, strict application of the view espoused by the Fourth Circuit will severely hamper the proper assertion of associational standing by many associations who are composed of members drawn from a variety of racial, social and economic backgrounds, but who nevertheless share in common certain interests furthered by

---

[2/](...continued)
520 F.2d 1, 5 (7th Cir. 1975). The Sixth, Tenth and District of Columbia Circuits have taken a contrary position. See Gillis v. U.S. Dep't of Health and Human Services, 759 F.2d 565, 572-573 (6th Cir. 1985); NCAA v. Califano, supra; and Sealift Command, supra, 824 F.2d at 1231-38.

membership in the association.[10/] Indeed, in the instant case the Court of Appeals based its conflict-of-interest finding solely on the fact that the Petitioner has minority members who qualify for MBE status under the Maryland statute and presumably benefit from its operation.[11/] But there is no reason to assume, as did the Court of Appeals, that simply because a statute might work generally to the economic advan-

---

[10/] Cf. Gillis, supra, 759 F.2d at 572-573 ("carried to its logical extreme, evaluation of representational standing in terms of the adverseness of remote interests of discrete members would seriously undermine the ability of individuals through organizations to achieve public interest objectives through the legal system").

[11/] No evidence was introduced on this point beyond the names of the Petitioner's members who were MBEs. To the extent that specific evidence was sought in discovery concerning the reaction of MBE members to Petitioner's institution of its lawsuit, the record showed only that no MBE member had raised an objection to the suit.

tage of an MBE member of Petitioner that such a member would necessarily favor continuation of an unconstitutional program of race-based discrimination. Cf. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (minorities may oppose remedial programs on the practical ground that they promote stereotypical views of minorities as unable to achieve success without special governmental assistance).

For all of these reasons, Petitioner respectfully submits that the Court below erred in its application of the third prong of the Hunt test, and has created a standard for harmony in member interests that will work great mischief and injustice as this and other associations seek judicial relief to further the legitimate common interests of their injured members. Under the standard that the Court of Appeals has articulated, it is extremely doubtful that

any but the most restrictive in admission to membership and narrowly focused of associations could survive a challenge to its associational standing.[12/]

We respectfully urge this Court, therefore, to review and reverse the analysis of the Court of Appeals on this important point of federal standing law.

12/ Frequent litigants before this Court and others would clearly be in jeopardy of losing the right to initiate even injunctive or declaratory actions relevant to their members' associational interests. Labor unions would be particularly vulnerable because of the democratic principles under which they must operate. Public interest groups such as the Sierra Club will find that they may not challenge regulations or projects of benefit to the business interests of some of their members and civil rights proponents such as the National Association for the Advancement of Colored People may find that a multi-racial membership disqualifies them from asserting claims that are thought inconsistent with the interests of portions of their memberships.

C. Certiorari Should Be Granted Because The Court of Appeals Misapplied The Opinions Of This Court Governing Summary Judgment And Rendered A Decision In Conflict With That Of Another Circuit.

The Court of Appeals held that the Respondent was entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure because the Association had not come forward with evidence of harm sufficient to confer standing upon it. In so doing, the Court refused to consider the factual averments contained in a letter written by Association member McLean Construction Co. (A-106) that was incorporated into the deposition testimony of Petitioner's Executive Director and offered by Respondent as part of its summary judgment papers. Those averments were sufficient to establish the existence of a material issue of fact as to the economic harm done to Association members by the requirements of the Maryland MBE program.

The Court of Appeals refused to consider the McLean letter because it considered it to be inadmissible hearsay, even though the Respondent had offered the letter and did not object to its consideration.[13/] The Court's position was directly contrary to the statement of this Court in Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), that "Rule 56 does not require the non-moving party [to] produce evidence in a form that would be admissible at trial."

Further, the Court of Appeals' additional finding that the McLean letter presented only "passing" and insufficient evidence of harm to its economic interests

---

13/ Inadmissible hearsay evidence may be admitted where it is not objected to and may be considered when determining the facts. Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 37-38 (D.C. Cir. 1987); Diaz v. United States, 233 U.S. 442, 450 (1912).

is simply wrong and ignores the instruction of this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), that in the context of a motion for summary judgment, it must draw "all justifiable inferences in favor of the nonmovant." Plainly, the contents of the McLean letter, whether they constituted or were capable of being "reduced to admissible evidence," Celotex Corp., supra at 317, when coupled with the reasonable inferences to be drawn from the presence of the elaborate administrative demands placed upon bidding contractors by the regulations implementing the Maryland MBE program (App. A-83-88), were more than sufficient under the opinions of this Court to survive the Respondent's Motion for Summary Judgment.

Further, the Fourth Circuit's refusal to consider as significant the economic impact of participation in the Maryland MBE

program conflicts with the Ninth Circuit's recent decision in Coral Construction, which noted that the contractor plaintiff had standing to question a gender-based preference even though the contractor had not lost the contract in question as the result of application of the preference. "The question is whether Coral Construction has alleged a more certain injury than a potential lost bid." LEXIS 17784 at 22, slip op. at 57. The court distinguished the holding in S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 758 (11th Cir.), cert. denied, 111 S. Ct. 2274 (1991), that there was no injury where a set-aside applied to all bidders equally. Rather, the Ninth Circuit reasoned,

> As a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually loses a bid, but every time the company simply places a bid. Indeed, Coral Construction

> suffers injury for standing purposes even when it is the successful bidder, as it must adjust its bid to reflect the fixed five-percent adjustment given to WBEs. Each bid placed by the company undoubtedly reflects the unequal competition.

LEXIS 17784 at 23, slip op. at 59.

Thus, unlike the Fourth Circuit, the Ninth Circuit has recognized the economic injury that is implicit in participation in a program of racial preferences.

D. Certiorari Should Be Granted Because The Ruling That The Association Lacked Standing To Challenge The MBE Statute Because Its Members Had Not Suffered Noneconomic Harm Conflicts With Opinions Of This Court, And In Other Circuits.

The Court of Appeals found that, despite its assertions to the contrary, Petitioner had not adduced evidence that its members had been "harmed" in any way by the Maryland MBE statute. In so doing, the Court discounted the Association's claims of non-economic harm, despite the fact that

Petitioner sought declaratory and injunctive relief only,[14] and repeatedly asserted that it was entitled to ground its associational standing on the fact that its members suffered a loss of their liberty interests. Petitioner asserted in that regard that its members were compelled by the State MBE law -- a law beyond the power of the State to constitutionally maintain -- to engage in racial discrimination in subcontracting if they wished to do business with the State.[15] Indeed, Peti-

---

[14] Petitioner was precluded by this Court's opinion in Will v. Mich. Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304 (1989), from seeking money damages in this proceeding, in any event.

[15] As evidenced by the Petitioner's Articles of Incorporation and By-Laws, it is an association governed by contractor members who "contract or subcontract the construction of highways, bridges, airports, tunnels and other transportation facilities in Maryland . . ." Petitioner's contractor members are, therefore, (continued...)

tioner's members are and were the individuals who were "directly affected by the laws and practices against whom their complaints are directed." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 224 n.9 (1963). Petitioner further claimed that its members were subject to the distinct threat of harm because their participation in the assertedly unlawful scheme of racial classification embodied in the State's MBE subcontracting program subjected Plaintiff's members to potential liability for civil rights claims brought by nonminority subcontractors who thought themselves the victims of racial discrimination. See Lugar v. Edmonson Oil Co., 457 U.S. 922, 933-934 (1982) (private party found to be engaged in state-required

---

15/ (...continued)
dependent on contracts covered by the Maryland MBE statute.

discrimination will be held answerable in damages).

Although the Court of Appeals declined to address the case, Petitioner also pointed out that the position of its members in the instant matter was identical to that of the contractor members in Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), where, in a pre-Hunt decision, the Third Circuit held that contractor members of an association had standing to challenge the constitutionality of the so-called "Philadelphia Plan," an Executive Order obligating bidders on federal highway construction projects to commit themselves to meet certain minority hiring goals. In language of particular moment here, the Third Circuit noted that "the Contractor plaintiffs who as bidders are directly impacted

by the requirement that they agree in their bid to comply with the Plan, clearly have standing." 442 F.2d at 166.

For all of these reasons, Petitioner asserts that it plainly has standing for purposes of challenging the maintenance of the MBE statute. Other cases are instructive. For example, in Doe v. Bolton, 410 U.S. 179, 188 (1972), this Court found that, even in the absence of a threatened prosecution, a Georgia physician had standing to challenge the constitutionality of the State's criminal abortion statutes because the physician "is the one against whom these criminal statutes operate." This rationale was recognized in the civil context in Singleton v. Wulff, 428 U.S. 106, 113 (1976), where this Court assumed, without deciding, that doctors who sought a declaratory judgment invalidating a statute prohibiting certain abortions may

be viewed as asserting their own constitutional right to practice medicine free from interference by the state. Cf. Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 875 (5th Cir. 1975) (doctor had personal stake in challenging abortion statute to secure his right "to practice medicine free from the imposition of arbitrary restraints").

In Lake Carriers' Association v. MacMullen, 406 U.S. 498 (1972), this Court found that an association and its members had standing to challenge the legality of a state sewage control statute, even in light of a moratorium on enforcement of the statute, where the threat of future enforcement coupled with the state's then-present efforts to encourage voluntary compliance created a concrete controversy over the statute's validity.

Also, in Pennell v. City of San Jose, ___ U.S. ___, 108 S. Ct. 849 (1988), this Court held that an association of landlords had standing to challenge the City's rent control ordinance based upon the fact that the association's members owned property subject to the ordinance. In the face of a contention that the association lacked standing because it had not shown that its members rented to so-called "hardship tenants" who were the beneficiaries of the ordinance, this Court found a sufficient threat of actual injury in the fact that the ordinance would be enforced against association members with a likely reduction in the amount chargeable as rent.

In the instant case the contractor members of the Petitioner, against whom the statute is admittedly enforced, assert that the State of Maryland has no right, under the principles set out in Croson, to

infringe their business freedoms and expose them to potential liability by requiring that they search out subcontractors based on race. They seek only a declaration that the State may not lawfully require such conduct of them and, because it may not, an injunction preventing the State from maintaining the requirement, absent satisfaction of the prerequisites established in Croson. In these circumstances, where the focus is not upon monies lost by an individual contractor member, but rather the constitutionality of the underlying statutory scheme, the Petitioner is not only a proper plaintiff, it is the logical and appropriate party to advance the general interests of its members. Cf. New York State Club Ass'n v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 2232 n.4 (1988) (consortium of private clubs and associations held to have standing to attack

facial constitutionality of law prohibiting discrimination in such clubs and associations; necessary proof may be presented in a group context); United Auto Workers v. Brock, 477 U.S. at 289 (associational representation permits access to greater capital and expertise of benefit to both the association's members and the judicial system).

For all these reasons, the Court of Appeals' insistence that Petitioner demonstrate that the Maryland MBE statute has caused one or more of its members to lose money fails to conform to the relevant opinions of this Court and in other circuits. Petitioner has demonstrated its standing under the first prong of the Hunt test, and this Court should so find.

X

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue and the judgment of the Court of Appeals should be reversed and remanded with instructions to permit Petitioner to amend its Complaint to attack the current version of the Maryland MBE statute and to proceed to an expedited trial on the merits.

Respectfully submitted,

Leslie Robert Stellman
Counsel of Record for Petitioner
John W. Kyle
LITTLER, MENDELSON, FASTIFF & TICHY
The World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005

Walter H. Ryland
WILLIAMS MULLEN CHRISTIAN & DOBBINS
Two James Center
1021 East Carey Street
Richmond, Virginia 23210-1320
(804) 643-1991

146.804

91-294

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

LESLIE ROBERT STELLMAN,
Counsel of Record
for Petitioner,

JOHN W. KYLE,
LITTLER, MENDELSON, FASTIFF & TICHY,
The World Trade Center, Suite 1653,
Baltimore, Maryland 21202-3005,

WALTER H. RYLAND,
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS,
Two James Center,
1021 East Carey Street,
Richmond, Virginia 23210-1320.

August 19, 1991

The Daily Record Company
11 East Saratoga Street, Baltimore, MD 21202 — (301) 752-3849

TABLE OF APPENDIX

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

THE MARYLAND HIGHWAYS CONTRACTORS ASSOCIATION, INC.,

Plaintiff

v.

STATE OF MARYLAND, et al.

Defendants

CIVIL ACTION NO. R-89-2410

: : oOo : :

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (CA-89-2410-R)

Argued: January 8, 1991
Decided: May 20, 1991

Before ERVIN, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

Vacated and remanded by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Phillips and Judge Murnaghan joined.

ARGUED: Leslie Robert Stellman, LITTLER, MENDELSON, FASTIFF & TICHY, Baltimore, Maryland; Walter Howard Ryland, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, P.C., Richmond, Virginia, for Appellant. Ralph S. Tyler, Assistant Attorney General, Baltimore, Maryland, for Appellees. ON BRIEF: John William Kyle, LITTLER, MENDELSON, FASTIFF & TICHY, Baltimore, Maryland; Wayland E. Hundley, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, P.C., Richmond, Virginia, for Appellant. J. Joseph Curran, Jr., Attorney General, Andrew H. Baida, Assistant Attorney General, Baltimore, Maryland, for Appellees.

ERVIN, Chief Judge:

The Maryland Highway Contractors Association, Inc. ("Association") sought declaratory and injunctive relief against the State of Maryland ("Maryland") and several state officials in their official capacities in the United States District Court for the District of Maryland. Specifically, the Association wanted a determination that Maryland's Minority Business Enterprise[1/] ("MBE") statute and accompanying regulations violated the

---

1/ In 1988, a Minority Business Enterprise was defined as a legal entity that was at least 51% owned or controlled by one or more members of a group "that is disadvantaged socially or economically, including: 1. Alaskan natives; 2. American Indians; 3. Asians; 4. Blacks; 5. Hispanics; 6. Pacific Islanders; 7. women; or 8. physically or mentally disabled individuals." Md. State Fin. & Procurement Code Ann. § 14-301(e) (1988) (repealed by 1990 Md. Laws Ch. 708).

constitutional and statutory rights of the Association and its members. By a motion for summary judgment, Maryland challenged the Association's standing to sue, and the district court granted the motion, finding no standing.

In the interim between the district court's decision and this appeal, the Maryland legislature repealed the MBE statute at issue here and replaced it with a new one. We find that this repeal and subsequent enactment rendered this case moot, and so we hereby vacate the district court's decision and remand to the district court with instructions to dismiss.

I.

The Association is an organization of contracting firms whose members regularly bid on highway construction projects. The Association brought suit alleging that the 1988 MBE statute and accompanying regula-

tions violate the Constitution and federal statutes. The Association claimed that the statute and regulations violate the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 2000d, and 42 U.S.C. § 1983.

Maryland moved for summary judgment on the ground that the Association had no standing to sue. Extensive discovery was conducted on the issue of standing, and the district court held a hearing to resolve the issue. After oral argument, the district court agreed with Maryland that the Association lacked standing to sue and granted Maryland's motion for summary judgment on that basis. This appeal followed.

II.

In 1978, Maryland adopted a statutory and regulatory scheme designed to encourage participation by MBEs certified by state

law and to provide a fair share of contracts to MBEs for the procurement of supplies and services. The version of the statute in effect at the start of these proceedings was Md. State Fin. & Procurement Code Ann. § 14-302(a)(1), (2) (1988) (repealed by 1990 Md. Laws Ch. 708). The 1988 MBE scheme set a goal for several Maryland departments to award 10% of their total dollar of procurement contracts either directly or indirectly to certified MBEs. The departments included: The Department of General Services; the Interagency Committee on School Construction; the Maryland Food Center Authority; the Maryland Stadium Authority; and the University of Maryland System. Md. State Fin. & Procurement Code Ann. § 14-302(b)(1) (1988) (repealed by 1990 Md. Laws Ch. 708). The Department of Transportation was supposed to achieve the same goal, but only

with respect to procurement contracts totalling $100,000 or more. Md. State Fin. & Procurement Code Ann. § 14-302(b)(2) (1988) (repealed by 1990 Md. Laws Ch. 708).

The 1988 MBE statute directed the Maryland Board of Public Works to adopt regulations to achieve the goals of the statute. See Code of Maryland Regulations (COMAR) 21.11.03.01 et seq. The regulations adopted set forth the following requirements: (1) each contract solicitation must set out the expected degree of MBE participation; (2) the relevant state agency must provide a list of certified MBEs to each prospective contractor. The regulations also set out provisions that ensure the uniformity of requests for bids; provisions that ensure the timing of requests and submissions of bids on subcontracts; and provisions that ensure that the State is not fiscally disadvantaged by

inadequate responses by MBEs to requests for bids. COMAR 21.11.03.01 et seq.

The regulations also provided that MBE participation may be waived under certain circumstances. COMAR 21.11.03.11. Waiver might be obtained if the contract bidder could make a reasonable demonstration that MBE participation was not obtainable, or was not obtainable at a reasonable price, but only if the state procurement agency decided that the public interest would be served by the waiver. Id.

III.

On July 1, 1990, after the decision by the district court in this case, the Maryland legislature repealed the MBE statute and enacted a new and revised MBE statute to replace it. See Md. State Fin. & Procurement Code Ann. §§ 14-301 et seq. (1990). The new statute, by its terms, attempts to comply with the Supreme Court's

holding regarding MBE statutes in City of Richmond v. Croson, 488 U.S. 469 (1989).[2/]

Maryland commissioned a Minority Business Utilization Study, held legislative hearings, and determined that Maryland had engaged in discrimination against certain groups. See 1990 Md. Laws Ch. 708, preamble. As a result of the study, the Maryland legislature enacted a

---

2/ In Croson, the Supreme Court held that a state or municipality must show that it had actually discriminated against minority groups before it could enact remedial legislation. 488 U.S. at 492. The Court explained:

> While the states and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.

488 U.S. at 504.

new MBE statute protecting those classes of minorities which the study showed Maryland had discriminated against: American Indians; Asians; Blacks; Hispanics; women; and physically or mentally disabled individuals. Md. State Fin. & Procurement Code Ann. § 14-301(f) (1990). The legislature thus repealed the former portion of the statute which protected Alaskan natives and Pacific Islanders. Compare Md. State Fin. & Procurement Code Ann. § 14-301(f) (1990) with Md. State Fin. & Procurement Code Ann. § 14-301(e) (1988) (repealed by 1990 Md. Laws Ch. 708). Most of the remaining provisions in the MBE statute were not changed by the new MBE law.

IV.

The district court held that the Association lacked standing to sue in this case. We must review the court's holding

"in light of [the state] law as it now stands, not as it stood when the judgment below was entered." Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972) (per curiam); Fusari v. Steinberg, 419 U.S. 370, 387 (1975). As noted above, the Maryland legislature repealed the MBE statute which was effective when the district court rendered its decision, replacing the old MBE statute with a new one. The actions by the Maryland legislature had the effect of rendering the Association's case moot.

A case is moot when it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Diffenderfer, 404 U.S. at 414 (quoting Hall v. Beals, 396 U.S. 45, 48 (1969)). Here, we would be rendering an advisory opinion if we reached the merits

of this case. The statute challenged by the Association no longer exists; a new statute replaced it. In order to determine if someone has been injured by the new statute, we would need more information about the new statute than is presently before us. "We are unable meaningfully to assess the issues in this appeal on the present record." Fusari, 419 U.S. at 387.

The Association asserts that the new statute has "only minor, insignificant modifications" from the old one. We disagree. The new statute was enacted after an independent study was conducted to ascertain whether Maryland participated in discrimination. As a result of the study, the new statute eliminated two of the groups previously protected by the MBE statute. These facts show that Maryland was attempting to meet the requirements of the Supreme Court's holding in City of

Richmond v. Croson, 488 U.S. 469 (1989). Whether Maryland's new statute meets the requirements of Croson will likely be the subject of a challenge to the new statute. However, we do not have enough facts before us in this case to evaluate the new statute in light of Croson. As a result, the present case is moot.

When a case is rendered moot while on appeal, the established practice is to reverse or vacate the judgment below and remand with a direction to dismiss. United States v. Munsinger, 340 U.S. 36, 39 (1950). Because we hold that the Association's claim against Maryland is moot, we vacate the district court's order granting summary judgment to Maryland, and we direct that court to dismiss this case as moot.

V.

Because of the likelihood of a new attack upon the constitutionality of the present Maryland MBE statute, we elect to address the issue of standing in order to guide subsequent litigation.

Standing is a component of a federal court's limited jurisdiction. Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." U.S. Const. Art. III. The requirement of standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968). Thus, in order to have standing, a party must be able to demonstrate a "distinct and palpable injury" that is likely to be redressed if the requested relief is granted. Valley

Forge College v. Americans United, 454 U.S. 464, 488 (1982).

Associations can allege standing based upon two distinct theories. First, the association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. 490, 511 (1975). Second, the association may have standing as the representative of its members who have been harmed. Id. See also Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

A.

In this case, the Association has no standing to sue in its own right. When determining whether an association has standing, a court conducts the same inquiry as in the case of an individual, determining if the plaintiff alleged such a

personal stake in the outcome of the matter to warrant his invocation of federal court jurisdiction. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982); Allen v. Wright, 468 U.S. 737, 750 (1984). Here, the Association has not alleged a sufficient personal stake. In the complaint, the Association alleged that it and its members had been injured in their business or property. However, during discovery, the Association came forward with no evidence that it had been so injured. In fact, the president of the Association admitted that the Association could not prove that it had lost any membership dues. To the contrary, the president stated that the Association had gained at least one member as a result of filing the current suit, with that member adding $5,000 in annual dues. Thus, the Association has failed to put forth any

evidence that it was injured economically by the MBE statute.

The Association argued that it had suffered a non-economic injury to its "organizational purpose" due to the MBE statute. The Association points to its charter and bylaws in support of this contention. However, as the Supreme Court has noted,

> an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Article III. Insofar as these organizations seek standing based on their special interest [in the subject matter of litigation] their complaint must fail. Since they allege no injury to themselves as organizations, . . . they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right.

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976). In this

case, although the Association alleges that its broad purposes have been violated by the MBE statute, this type of injury is insufficient to support standing. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

B.

Although an organization does not have standing in its own right, it may have representational standing. Warth v. Seldin, 422 U.S. at 511. The Supreme Court set out a three part test for representational standing for organizations in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). An organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought

requires the participation of individual members in the lawsuit. Id. at 343; Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 662 (4th Cir. 1989), aff'd sub nom. Wilder v. Virginia Hosp. Ass'n, 496 U.S. ____, 110 S. Ct. 49 (1990).

Thus, we must first determine whether any of the Association's members have the right to sue in their own right. The Association alleged in its complaint that its members had been injured by the statute. However, in its answers to numerous interrogatories on this subject, the Association admitted that: (1) it had no information concerning any member who may have lost a bid or contract or lost profits as a result of the MBE statute; (2) it had conducted no studies to ascertain whether members had been so injured; and (3) it possessed no documents relating to members' lost profits.

In his deposition, the president testified that the Association had no evidence to support its claim that the MBE statute results in higher construction costs. However, the Association relies upon a letter from one of its members, which was referred to in the president's deposition, and was attached as an exhibit thereto. The letter talks generally about problems that the company perceives are associated with the MBE requirements. However, the only mention of any direct economic injury occurs during a discussion of requirements of the City of Baltimore, not of the State of Maryland.

The district court stated that the letter was inadmissible hearsay. In addition, the court noted that the president of the Association had conceded in his deposition that the Association had taken no steps to verify the letter's

claim. Further, the court noted that the Association had no evidence to support the letter's claim. The court did not, as the Association states, merely hold that the letter was inadmissible hearsay. Rather, the court further discussed the letter in light of the contrary testimony of the Association's president. Ultimately, the court concluded that the Association failed to establish that its members could sue in their own right, thus failing the first prong of the Hunt test.

The district court properly found that the letter did not show a sufficient injury in fact. First, several circuits, including the Fourth Circuit, have stated that hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment. See, e.g., Rohrbough v. Wyeth Laboratories, Inc., 916 F.2d 970, 973-74 n.8 (4th Cir. 1990);

Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990); Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 570 n.4 (7th Cir. 1989); Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1319 (8th Cir. 1986). Thus, the district court was correct to state that the letter was inadmissible hearsay.

Second, even if we were to hold that the evidence in the letter was admissible, it would not be enough to withstand a summary judgment motion. As the Supreme Court said in Anderson v. Liberty Lobby, Inc.,

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- "whether there is [evidence] upon which a jury can properly

> proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

477 U.S. 242, 252 (1986) (quoting Improvement Co. v. Munson, 14 Wall 442, 448, 20 L. Ed. 867 (1872)). The Association stated that it had no data, conducted no studies, and could not come forward with the name of a single firm who would state that it had been injured. In light of this overwhelming evidence of lack of injury to members of the Association, the passing mention of economic harm in a letter of questionable reliability was not enough evidence for a jury to find by a preponderance of the evidence that any member suffered an injury.

The Association relies upon Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990), for support of its claim that the Association's members have

been injured. The Association claims that the case is on all fours with the case at bar. In that case, however, the court found that only the associations whose members had alleged specific harm had standing. Id. at 1283-84. The associations who came forward with evidence that their members had been denied bids, for example, were found to have standing. Id. at 1283. However, those associations who only came forward with evidence that their members "generally bid on these types of projects" did not "provide sufficient details of the injury suffered to meet the Article III requirement." Id. at 1284. In the case at bar, the evidence that the Association came forward with was similarly insufficient to meet the Article III requirement.

In sum, the Association did not meet the first prong of the Hunt three-prong

test for representational standing. In addition, the Association also failed to meet the third prong of the Hunt test. The district court found it unnecessary to reach this issue because of its finding that the Association did not meet the first prong of the Hunt test, but we deem it not amiss to do so.

Prong three of the Hunt test provides that neither the claim nor the relief requested can require the participation of individual members. 432 U.S. at 343. This prong is not met when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests. See Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979). The Eighth Circuit explained this

prong in Associated General Contractors of North Dakota v. Otter Tail Power Co.:

> [T]he claim asserted requires the participation of the individual members of the association. The association is clearly not in a position to speak for its members on the question of whether the [agreement] is violative of antitrust laws. Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members. Some members are not qualified and others are not willing to work on the project; some stand to benefit from working on the project under the Agreement and still others will be hurt by not being able to do so. . . . It is for the court, not the members of the association, to determine whether their interests require individual representation. Here, in view of the actual and potential conflicts, they clearly do.

Id. at 691 (emphasis added). Like the members of the association in Associated General Contractors, the members of the Association in this case have conflicting

interests. Some of the members of the Association are certified MBEs; they benefit from the continued enforcement of the MBE statute. Other non-minority members of the Association would benefit if the MBE statute were declared unconstitutional. Thus, there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their interests.

In a similar case, the United States District Court for the District of Utah granted the defendant's motion for summary judgment on the ground that the plaintiff had failed to meet the third prong of the Hunt test. Mountain States Legal Foundation v. Dole, 655 F. Supp. 1424 (D. Utah 1987). The court explained:

> It is entirely conceivable in this case, however, that many members of [the association] would oppose this litigation on ideological grounds or even because they are the

> beneficiaries of the Act's affirmative action provisions. Indeed, at oral argument, counsel for [the association] conceded that the decision to sue is made by the association's Board of Directors rather than by the members as a whole.

Id. at 1431. Similarly, in the present case, the decision to litigate this case was made by the Board of the Association, on which there is no MBE representative. Further, the Board took the unusual position of not telling the members of its decision to litigate until after the suit had already been filed. This secrecy raises suspicion regarding the motives of the Association. Because of the actual conflict of interest and the potential for conflict in this case, the Association has failed to meet the third prong of the Hunt test.

Since the Association failed to meet the first and third prongs of the Hunt test, entry of summary judgment in favor of

Maryland was proper. As a plaintiff, the Association had the burden of proving that it had standing to sue. Because it failed to prove this essential element of its case, the district court correctly ruled that the Association lacked standing.

VI.

To summarize, because of the repeal of the old MBE statute and the subsequent enactment of the new MBE statute by the Maryland legislature, the Association's claim against Maryland was rendered moot. In addition, the district court correctly found that the Association lacked standing to sue under the present facts. Because this case is now moot, we vacate the decision of the district court and remand with instructions to dismiss.

VACATED AND REMANDED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

THE MARYLAND HIGHWAYS CONTRACTORS ASSOCIATION, INC.,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. R-89-2410
STATE OF MARYLAND, et al.	:	
Defendants	:	

: : oOo : :

MEMORANDUM AND ORDER

Pending before the court in the above-captioned case is a motion for summary judgment on jurisdictional issues filed by defendants. The motion has been fully briefed, and the Court has heard oral argument from the parties. For the reasons set forth herein, defendants' motion shall be granted.

I. Introduction

Plaintiff Maryland Highway Contractors Association, Inc. (the "Association") seeks declaratory and injunctive relief against the State of Maryland and several state officials in their official capacities (collectively the "State"), claiming that the State's Minority Business Enterprise ("MBE") statute and regulations violate plaintiff's federal constitutional and statutory rights. The Association asserts that the MBE law unlawfully discriminates against it and its members on the basis of

race and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 2000d.

The parties have completed discovery on jurisdictional issues, and the State now seeks summary judgment on the ground that the Association does not have standing to bring this suit. The State contends that the Association lacks standing because (1) the undisputed facts establish that neither it nor its members have suffered any injury as a result of the State's MBE law, and (2) a conflict of interest exists among the Association's members, thus requiring the participation of individual members in this litigation and disqualifying the Association from bringing this action on their behalf.

II. Standards for Summary Judgment.

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure serves

the important purpose of "conserv[ing] judicial time and energy by avoiding unnecessary trial and by providing a speedy and efficient summary disposition" of litigation in which the plaintiff fails to make some minimal showing that the defendant may be liable on the claims alleged. Bland v. Norfolk & Southern R.R. Co., 406 F.2d 863, 866 (4th Cir. 1969). The applicable standards for analyzing a motion for summary judgment under Rule 56 are well-established. The defendant[3/] seeking summary judgment bears the burden of showing the absence of any genuine issue of material fact and that he is entitled to judgment as a matter of law. In determining whether the defendant has sustained this burden, this Court must consider whether, when assessing the evidence in the

---

3/The analysis is equally applicable, of course, to motions for summary judgment made by plaintiffs.

light most favorable to the plaintiff, a "fair-minded jury could return a verdict for the plaintiff. . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Pulliam Investment Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987). Thus, when the undisputed facts establish that an essential element of a plaintiff's case is missing, summary judgment is appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. at 252; see also Barwick v. Celotex Corp., 736 F.2d 9436, 958-59 (4th Cir. 1984). It is against these standards that the Court shall review defendants' motion.

III. The Statutory and Regulatory Scheme.

The purpose of the MBE statute is to encourage participation by MBEs certified under state law and attempt to provide to MBEs a "fair share" of contracts for the procurement of supplies and services. Md. State Fin. & Procurement Code Ann. § 14-302(a)(1), (2). Specifically, the Department of General Services, the Interagency Committee on School Construction, the Maryland Food Center Authority, the Maryland Stadium Authority, and the University of Maryland system are to structure procurement procedures that "try to achieve the result that a minimum of 10% of [their] total dollar value of procurement contracts is made directly or indirectly from certified minority business enterprises." Id. § 14-302(b)(1). The Department of Transportation is authorized

to "try to achieve" the same goal, but only with respect to procurement contracts in excess of $100,000 on the prime or subcontract level. Id. § 14-302(b)(2).

An MBE is defined as any legal entity that is at least 51% owned or controlled by one or more members of a group "that is disadvantaged socially or economically, including: 1. Alaskan natives; 2. American Indians; 3. Asians; 4. Blacks; 5. Hispanics; 6. Pacific Islanders; 7. women; or 8. physically or mentally disabled individuals." Id. § 14-301(3). The MBE statute directs the Maryland Board of Public Works to adopt regulations and procedures to achieve the goals of the statute. The regulations adopted include a requirement that each contract solicitation set forth expected degree of MBE participation; a requirement that the affected state agency provide a list of

certified MBEs to each prospective contractor; provisions that ensure that uniformity of requests for bids; provisions concerning the timing of requests and submissions of bids on subcontracts; and provisions that ensure the State not be fiscally disadvantaged by an inadequate response by MBEs to requests for bids. Id. § 14-303(b); Code of Maryland Regulations (COMAR) 21.11.03.01 et seq.

The regulations adopted by the Board of Public Works also set forth the circumstances under which MBE participation may be waived. COMAR 21.11.03.11. To receive a waiver, the contract bidder or offeror must make a reasonable demonstration that MBE participation is not obtainable or is not obtainable at a reasonable price, and the state procurement agency must decide that the public interest would be served by a waiver. Id.

IV. Standing.

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." Article III does not provide the federal courts with the unconditional authority to determine the constitutionality of legislative or executive acts. Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 1471 (1982). Rather, federal judicial power "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." Id. at 471 (quoting Chicago & Grand Trunk RR. Co. v. Wellman, 143 U.S. 339, 345 (1982)).

As an incident to the "case or controversy" requirement of Article III, a litigant is required to have "standing" to challenge the action sought to be

adjudicated in federal court. The question of standing is the threshold question in every federal case, as it determines the power of the court to entertain the suit. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). While this inquiry involves constitutional limitations, it encompasses prudential considerations as well. As the Supreme Court aptly stated, "it has not always been clear in the opinions of [the Supreme] Court where particular features of the 'standing' requirement have been required by Art. III ex proprio vigore, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution." Valley Forge College, 454 U.S. at 471.

At a minimum, however, Article III requires a plaintiff "[to] to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Id. at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). the injury must be "distinct and palpable," Warth v. Seldin, 422 U.S. at 501, not "abstract" or "conjectural" or "hypothetical." Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983). Moreover, "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision." Allen v. Wright, 468 U.S. 737, 751 (1984) (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 138, 41 (1976)).

The plaintiff in this instant action is an association. An association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. at 511. However, the association, as with any other plaintiff, 'must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. at 750. In addition, an association may have standing solely as the representative of its members. Warth v. Seldin, 422 U.S. at 511. Associational standing "does not eliminate or attenuate the constitutional requirement of case or controversy." Id. The association must assert that the members "are suffering immediate or threatened injury as a result

of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Id.

A. Plaintiff's standing to sue in its own right.

As previously stated, an organization may have standing in its own right if the organization can demonstrate injury to itself that is causally linked to the defendant's alleged unlawful conduct. the State contends that the Association has failed to establish such an injury and thus lacks standing to sue in its own right. The defendants' challenge to plaintiff's standing is not based solely on the pleadings. Rather, the parties have conducted extensive discovery on the issue of standing. The State has propounded interrogatories and requests for production of documents relating to possible injuries suffered by the Association and/or its members as a result of the MBE statute. In

addition, on October 31, 1989, the State deposed Mr. Robert E. Latham, the Executive Director of the Maryland Highway Contractors Association. The State contends that Mr. Latham's answers at his deposition and to the interrogatories and requests for production propounded by the State clearly reveal that the Association have suffered no injury in fact and thus has no standing in its own right to challenge the MBE statute.

One of the injuries alleged in the Association's complaint is that "Plaintiff and its members have been injured in their business or property as the result of the racial discrimination currently being practiced by the State of Maryland in the award of construction contracts." Complaint para 40. The Association, however, has come forward with no evidence establishing any economic injury to its

business or property. Indeed, at his deposition, Mr. Latham conceded that only "sheer speculation" supported the Association's claim that the State's MBE law caused the Association to lose membership dues. See Latham Dep. Tr. at 54. In fact, Mr. Latham testified that as a result of bringing this suit, the Association gained at least one member who contributes approximately $ 5000 a year in membership dues. See Latham Dep. Tr. at 30, 54. Thus, the existence of the MBE statute actually resulted in an increase in the Association's membership and membership contributions.

Having failed to demonstrate any economic injury as a result of the MBE statute, the Association attempts to establish an injury to its "organizational purpose" as its basis for standing. The Association has identified the following

purposes listed in its Articles of Incorporation as having been frustrated by the MBE statute:

> (5) To seek correction of injurious, discriminatory or unfair business methods practiced by or against those engaged in the construction business;
>
> (6) To place the business risks assumed by those engaged in the construction industry as nearly as possible on a parity with the risks assumed by other industries of production;
> (7) to eliminate waste and reduce construction costs through research and through cooperation with other agencies of construction.
>
> (7) To eliminate waste and reduce construction costs through research and through cooperation with other agencies of construction.

The Association contends that the seventh purpose is hindered by the MBE statute because "studies . . . have shown that these types of programs foster waste. And . . . have increased the cost of construction." Latham Dep. Tr. at 44.

When pressed for evidence supporting this assertion, the Association admitted that it has none. Id. at 45-46. Similarly, the Association contends that the sixth organizational purpose is frustrated because the construction industry "has to bear the brunt of this particular issue . . . ." Yet again, the Association has produced no evidence supporting this claim.[4/]

4/The Association also contends that the purpose set forth in Article II, Section B of the Association's Bylaws is frustrated by the MBE statute because the statute results in increased construction costs. Article II, Section B is as follows:

> B. Represent its members in such a manner as to aid in the development of the best possible transportation system, in the interests of fair cost to the tax payer and fair return to the contractor and supplier.

Mr. Latham admitted, however, that the Association has no facts or evidence supporting this claim. Latham Dep. Tr. at 49-51.

During oral argument, counsel for plaintiff argued that the Association has standing in its own right because "[this lawsuit] is within the broad domain of [the Association's] organizational rights, and [the Association has] been injured in that regard."

Hearing Tr. at 31. The Association appears to contend that because one of the purposes of this organization is to correct "discriminatory or unfair business methods," and because the MBE statute is alleged to be "discriminatory and unfair," the Association therefore has suffered an injury and can bring this suit.

An organization's charter or bylaws cannot create standing. The mere existence of an allegedly unconstitutional statute that is somehow adverse to an organization's charger or bylaws does not create an injury. Otherwise, an organization could

challenge the constitutionality of any statute merely by amending its charter or bylaws. Such a situation would permit individuals to challenge the constitutionality of statutes with nothing more than a generalized grievance, thereby completely undermining the concept of standing and the requirements of Article III. "[A] mere 'interest in a problem,' no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to establish standing. Sierra Club v. Morton, 405 U.S. 727, 739 (1972); see Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 (1976) ("an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III") merely point to "broad purposes" of the organization and

stating that a statute violates those broad purposes without showing any concrete injury is nothing more than an abstract, generalized interest.

The Court does not doubt that the Association has a genuine interest in the future of the MBE statute. However, having failed to demonstrate any economic or non-economic injury to itself as a result of the challenged statute, the Association's constitutional challenge represents precisely the type of grievance this Court lacks authority to redress. Accordingly, the Court finds that the Association does not have standing in its own right to challenge the MBE statute.

B. Plaintiff's Standing to on Behalf of Its Members.

The only other possible standing theory upon which plaintiff might rely to challenge the constitutionality of Maryland's MBE law is that it is acting in

a representative capacity and suing on behalf of its members. See Warth v. Seldin, 422 U.S. at 511. To establish associational standing, the plaintiff must satisfy each of the following three conditions: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). Thus, the first inquiry is whether the Association's members have standing to sue in their own right. to establish that its members have standing, the Association must demonstrate that the members have suffered injury in fact as a result of the MBE statute.

The Association virtually admits that it cannot demonstrate that it members have suffered any economic injury due to the MBE statute. In its answer to interrogatories, the Association states that it has no information concerning any member who may have lost a bid or a contract or lost profits as a result of the MBE statute. See Plaintiff's Response to Request No. 6. Nevertheless, the Association claims its members have been injured because future economic injury is possible. See Plaintiff's Answer No. 6 to Defendant's Interrogatories ("Association members may be direct victims of discrimination sanctioned by the MBE statute to the extent that they may be denied opportunities because of their race or sex.") (emphasis added). Such sheer speculation is certainly an insufficient basis to justify

standing on the part of the Association to bring this action.

The Association maintains, however, that "compliance with the MBE statute requires that members expend time, money and resources in searching out, contracting with, or justifying failure to contract with, MBEs." Plaintiff's Answer to Interrogatory No. 6. The Association has failed to produce any evidence in support of this statement. During his deposition, Mr. Latham admitted that the Association has no "empirical data or evidence to support a claim that the MBE law in Maryland results in higher construction costs[.]" Latham Dep. Tr. at 45. Indeed, the sole "authority" for this assertion is a letter the Association received from the McLean Contracting Company setting forth problems that the McLean Contracting Company had with MBEs. At the outset, the

letter is not admissible evidence and thus cannot be used to support the Association's claim of standing. Moreover, Mr. Latham conceded that the Association has no evidence to support the letter's claim of increased costs and has made no effort to substantiate that claim. See Latham Dep. Tr. at 139-40.

As a final attempt to establish economic injury on the part of its members, the Association asserts that as a result of the MBE statute, its members are subjected to suit by non-minority subcontractors for making racial preferences. Hearing Tr. at 34. The Association even goes as far as to say that these potential suits could be brought under the Civil Rights Act, 42 U.S.C. § 1983 and § 1985. Id. In 1978 the Maryland General Assembly first enacted legislation directing certain departments to structure its procurement policies so

that a minimum of ten percent of its materials, supplies, equipment and services, including construction, were purchased from MBEs. See Act of May 16, 1978, ch. 575, 1978 Md. Laws 1892. The plaintiff's failure to cite a single instance in which a contractor has been sued by a non-minority subcontractor for racial discrimination leads the Court to believe that no such suit has occurred within the twelve years a Maryland MBE statute has been in existence. Thus, suit by a non-minority subcontractor for racial discrimination hardly appears to be threat of actual injury. Rather, this theory is merely an attempt on the part of plaintiff's counsel to invent some economic injury suffered by the Association's members as a result of the MBE statute in

the absence of any genuine economic injury.[5/]

While the Court recognizes that a relatively small economic injury may suffice to confer standing, the reality is that the Association has not produced any evidence of even a minute economic injury suffered by it's members as a result of the MBE statute. At oral argument, counsel for

---

5/Plaintiff also cites The Associated General Contractors of Connecticut, Inc. v. City of New Haven, ___ F.R.D. ___ (D. conn. March 10, 1990) in support of its assertion that its members have suffered injury in fact. In The Associated General Contractors, the Connecticut district court found that the plaintiff-association had standing to challenge New Haven's set-aside program because some of its members were non-minority subcontractors who could not compete for the set-aside portions of contracts. The court found that such deprivation was sufficient injury in fact to confer standing on those members to sue in their own right. Without expressing any opinion as to whether such a deprivation actually constitutes injury in fact, the court disregards this case because the Association has not established that it represents non-minority subcontractors who are denied the opportunity to compete for set-aside portions of contracts.

plaintiff mentioned for the first time forms that needed to be filled out pursuant to the MBE statute and regulations, telephone calls that at times had to be made, and the cost of rewriting bids to include MBEs. Again, however, the Association has produced no evidence documenting these alleged costs.

Having realized its inability to establish economic injury to its members, the Association has focused primarily on non-economic injury to its members as the basis for conferring standing. The Association contends that its members have been injured and thus have standing to bring this action because they must participate in the MBE program. Essentially, the Association contends that its members are injured by the mere "fact that employers or companies under this law have to comply with laws that force racial

preferences upon them . . . ." See Hearing Tr. at 33-35.

On of the cases plaintiff cites in support of its theory is Pennell v. City of San Jose, ___ U.S. ___,, 108 S.Ct. 849 (1988). Pennell involved a challenge to a rent control ordinance enacted by the City of San Jose which permitted a hearing officer to consider, among other factors, the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord. The plaintiffs in Pennell were Richard Pennell, an owner and lessor of 109 rental units in the city of San Jose, and the Tri-County Apartment House Owners Association, which represents owners and lessors of real property located in San Jose. Although the property owned by Pennell and the members of the association was subject to the Ordinance, the plaintiffs did not allege that either

Pennell or any member of the association had "hardship tenants" who might trigger the Ordinance's hearing process, nor did they specifically allege that they had been or will be aggrieved by the determination of a hearing officer that a certain proposed rent increase is unreasonable on the ground of tenant hardship. Id. at 855. Thus, the defendant contended that the plaintiffs lacked standing.

Unlike this instant action, the determination as to whether the plaintiffs in Pennell had standing was based solely on the pleadings. Thus, accepting as true plaintiffs' statement in the complaint that their properties were subject to the Ordinance, the Court found that it was not unadorned speculation "to conclude that the Ordinance will be enforced against members of the Association. Id. the Court then held that:

> The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, [was] a sufficient threat of actual injury to satisfy Art. III's requirement that '[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result to the statute's operation or enforcement." Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979).

Id.

In Pennell, the Court found that the plaintiffs had standing to challenge the statute because, as a result of being subject to the Ordinance, there was "a sufficient threat of actual injury." The court did not find, as plaintiff suggests, that "the mere fact that [the members] are operating under [an] unconstitutional law or an arguably unconstitutional law create[d] standing in that association." Hearing Tr.. at 23. Here, the members of

the Association are undoubtedly subject to the MBE statute. However, the Association has failed to demonstrate that the members have suffered any kind of actual injury, or even suffer any threat of actual injury, as a result of being subject to the MBE statute.

In further support of its theory that mere participation in the MBE program confers standing, the Association relies on several cases which the court finds completely inapposite to the facts of this instant action.[6/] In each of these cases, the plaintiffs had clearly suffered a distinct and palpable injury as a result of

---

6/These cases were cited by the Association in its brief and during oral argument and include the following: UAW v. Brock, 477 U.S. 274 (1986); Super Tire Engineering Company v. McCorkle, 416 U.S. 115 (1974); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Abingdon School District v. Schempp, 374 U.S. 203 (1963); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 360 U.S. 240 (1959).

the challenged statute. Indeed, the only case cited by the Association in support of its standing theory where the injury to the plaintiffs could be construed to be similar to the injury allegedly suffered by the Association's members, is a case in which the issue of standing was never addressed. In Michigan Road Builders Association v. Milliken, 571 F. Supp. 173 (E.D. Mich. 1983); rev'd on other ground, 834 F.2d 583 (6th Cir. 1987); aff'd, 109 S.Ct. 1333 (1989), the plaintiffs were (1) several non-profit associations whose members were construction firms, contractors and suppliers who did business in Michigan and (2) various profit corporations who either had received or had sought contracts with the State of Michigan. The plaintiffs brought suit to challenge the constitutionality of a statute establishing minority set-aside program. the plaintiffs

did not contend that they had been "(1) subjected to discrimination in the award of any particular contract or (2) denied the opportunity to bid on any contract because of [the challenged statute]." Michigan road Builders, 571 F. Supp. at 175. The district court addressed the merits of the claim without ever addressing the issue of standing.

Although it appears that the plaintiffs in Michigan Road builders and the plaintiff in this instant action are similarly situated, the fact remains that the Michigan district court never addressed the issue of standing. Thus, this Court has no idea on what basis the Michigan district court found standing, or even whether the court considered the possibility that the plaintiffs lacked standing. It is interesting to note that the only case that the Association has

found that arguably supports its theory of standing is one in which the issue of standing was never discussed. This Court will not be persuaded by silence.

The court, however, is persuaded by the Fourth Circuit's recent decision regarding a plaintiff's standing to challenge a statute similar to Maryland's MBE statute. In Carpenter v. Barnhart, No. 88-3578 (4th Cir. Jan. 16, 1990), the Fourth Circuit, in an unpublished opinion, addressed whether the plaintiffs, a contractor and his contracting firm, had standing to challenge North Carolina's Disadvantaged Business Enterprises ("DBE") statute. Plaintiffs alleged that the North Carolina set-aside program was a racial quota which denied them the opportunity for meaningful participation in the bidding process employed by the state to award

contracts for the construction of public highway.

The Fourth Circuit found that the plaintiffs lacked standing the bring the constitutional challenge because they failed to show any injury caused by the DBE program. Id. at 6. The plaintiffs did not regularly bid on North Carolina highway construction projects and "never identified any specific contracts that were denied him due to the DBE program." Id. at 8. The court denied plaintiffs standing based on "their loss of opportunity to contract with a government agency or department," finding that such a claim "amounts to no more than an assertion of hypothetical loss of business." Id. at 9. Moreover, the court found plaintiffs' contention that the DBE program excessively burdened plaintiffs because they were specialty contractors equally unavailing because "plaintiffs once

again failed to bring forth concrete evidence of injury to them as specialty contractors." Id at 9.

The Association attempts to distinguish the Carpenter case by asserting that it involved a plaintiff whose claim was a personal "as applied" challenge to a set-aside program while its claim is a "facial challenge" by an association to a program in which its members participate regularly. It appears that the Association believes that standing requirements vary depending on whether the plaintiff brings a facial challenge or a personal "as applied" challenge to a statute. Essentially, the Association contends that because it attacks the facial validity of the MBE statute, it is somehow relieved of Article III's injury in fact requirements. Not surprisingly, the Association cites no case in support of this proposition.

Mere participation in a program does not confer standing upon an individual or an association to attack the facial validity of the statute creating that program. The program must result in some injury to the participant before he or she can sustain a suit in federal court challenging the constitutionality of the statute. Here, the complete absence of any real, concrete injury to the Association or to its members leaves the court with no "controversy" to adjudicate and renders the court without authority to rule on the merits of the Association's constitutional claim.

Requiring the Association to demonstrate injury to itself or to its members as a result of the MBE statute is not an insurmountable task. According to the Association, however, its members are not willing to step forward and claim that

they have suffered any economic injury. See Hearing Tr. at 21-22. Moreover, the Association failed to conduct any studies supporting its theory that the MBE statute results in increased costs and decreased efficiency. One of the purposes of the Article III standing requirement is to ensure that a strong advocate is before the Court. The Association's failure to establish any distinct and palpable injury suffered by either itself or its members reveals that it is not a proper plaintiff to challenge the MBE statute. Having determined that the Association has failed to establish injury in fact, the Court does not reach the State's second argument that a conflict of interest exists between the Association's members.

Accordingly, it is this 19th day of June, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motion for summary judgment is GRANTED;

2. That the Clerk of the Court shall mail a copy of this Memorandum and Order to all counsel of record.

Norman P. Ramsey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE MARYLAND HIGHWAYS CONTRACTORS ASSOCIATION, INC.,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. R-89-2410
STATE OF MARYLAND, et al.	:	
Defendants	:	

: : o0o : :

JUDGMENT

This case has been remanded to this Court from the United States Court of Appeals for the Fourth Circuit. In accordance with that court's decision in No. 90-3102, dated May 20, 1991, this Court's June 19, 1990 Memorandum and Order is vacated as moot; plaintiff's complaint

is dismissed as moot; and each party shall bear its own costs.

SO ORDERED this ____ day of _____, 1991.

_____
Norman P. Ramsey
United States District Judge

Laws of Maryland, Chapter 708 (House Bill 1540)

Preamble

WHEREAS, In 1978 the General Assembly of Maryland enacted Chapter 575, creating a Minority Business Enterprise program as a remedy for past discrimination in the expenditure of State public contract dollars and, in 1983, enacted Chapter 193, reaffirming its conclusion that the State's Minority Business Enterprise program was necessary and should be continued; and

WHEREAS, In January, 1989, the Supreme Court of the United States, in City of Richmond v. J.A. Croson Co. held that State and local minority business programs should be narrowly tailored to remedy the effects of past discrimination; and

WHEREAS, The Governor and the Board of Public Works authorized the State to commission the firm of Coopers and Lybrand

to conduct a Minority Business Utilization Study and the firm has submitted the results of its study to the State; and

WHEREAS, That report and this implementing legislation have come before the General Assembly of Maryland, hearings have been held with respect to this matter, and the General Assembly has carefully considered the report, the proposed legislation, and all of the evidence before it; and

WHEREAS, There is a history in Maryland of discrimination against women, Blacks, and Hispanics which has resulted in businesses owned or controlled by them receiving disproportionately low shares of State public contract expenditures and, despite the existence of the State's Minority Business Enterprise program, the effects of past and current discrimination are continuing to impede businesses from

obtaining a fair share of both private and public contract dollars; and

WHEREAS, In Maryland and in the marketplace for State public contracts, businesses owned or controlled by Asians, Hispanics, and women are underutilized as State contractors and this disparity and other evidence demonstrates that this underutilization is the product of current, continuing racial discrimination against such persons in private and public contracting; and

WHEREAS, The General Assembly finds, on the basis of oral and written testimony, that there is a history in Maryland of discrimination against American Indians which has resulted in businesses owned or controlled by American Indians not receiving business in both the public and private sector and, but for the existence of the State's Minority Business Enterprise

Program, American Indians would continue to face serious economic disadvantage in their business ventures; and

WHEREAS, The Maryland Minority Business Enterprise program has not eradicated the impact of past discrimination or precluded ongoing discrimination against such businesses; and

WHEREAS, Continuation of a narrowly tailored program, meeting the requirements of Croson, is essential to the ultimate achievement of a marketplace in which minority firms will not be subject to discrimination and, without aid of such a program, will obtain a fair share of private and public contract expenditures; and

WHEREAS, Race and sex neutral means of assisting minority firms exist and have been attempted, but do not effectively eradicate the effects of past discrimina-

tion or preclude ongoing discrimination against minority business, and have no substantial likelihood of achieving the goal that these businesses will obtain a fair share of State public contract expenditures in the absence of a minority business program; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Maryland State Finance and Procurement Code Annotated §§ 14-301 through 14-303 [as amended by 1990 Md. Laws Ch. 708; deleted language lined out and added language underscored]:

§ 14-301. Definitions.

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Certification. -- "Certification" means the determination that

a legal entity is a minority business enterprise for the purposes of this subtitle ~~through a procedure that:~~

~~(1) the Department of Transportation uses; or~~

~~(2) the State Minority Business Certification Council recommends.~~

(c) Certification agency. -- "Certification agency" means the agency designated by the Board of Public Works under § 14-303(b) of this subtitle to certify and decertify minority business enterprises.

(d) Certified minority business enterprise. -- "Certified minority business enterprise" means a minority business enterprise that holds a certification.

(e) Designated unit. -- "Designated unit" means:

(1) the Department of General Services;

(2) The Department of Transportation;

(3) the Interagency Committee on School Construction;

(4) the Maryland Food Center Authority;

(5) the Maryland Stadium Authority;

(6) the University of Maryland System;

(7) for a procurement under Title 3, Subtitle 4 of this article, the Department of Budget and Fiscal Planning; and

(8) for a procurement in connection with construction of a State correctional facility under § 12-107 of this article, the Department of Public Safety and Correctional Services:

(f) Minority business enterprise. -- (1) "Minority business enterprise" means any legal entity, except a joint venture, that is:

(i) organized to engage in commercial transactions; and

(ii) at least 51% owned and controlled by 1 or more individuals who are members of a group that is disadvantaged socially or economically, including:

~~1. Alaskan natives;~~

1. ~~2.~~ American Indians;

2. ~~3.~~ Asians;

3. ~~4.~~ Blacks;

4. ~~5.~~ Hispanics;

~~6. Pacific islanders;~~

5. ~~7.~~ women; or

6. ~~8.~~ physically or mentally disabled individuals.

(2) "Minority business enterprise" includes a not for profit entity organized to promote the interests of physically or mentally disabled individuals.

§ 14-302. Procurement from minority businesses.

(a) In general. -- Except for leases of real property, each unit shall structure procurement procedures to:

(1) encourage participation in the process by certified minority business enterprises; and

(2) try to provide a fair share of procurement contracts to certified minority business enterprises.

(b) Goal in structuring procedures. -- (1) Except for leases of real property and except as provided in paragraph (2) of this subsection, each designated unit shall structure procurement procedures, consistent with the purposes of this subtitle to try to achieve the result that a minimum of 10% of the designated

unit's total dollar value of procurement contracts is made directly or indirectly from certified minority business enterprises.

(2) In procurement for construction, the Department of Transportation shall:

(i) structure procurement procedures, consistent with the purposes of this subtitle, to try to achieve participation by certified minority business enterprises in the amount of at least 10% of the dollar value of procurement contracts in excess of $100,000 on the prime or subcontract level; and

(ii) consider the practical severability of the construction projects.

(c) Conflicts with federal requirements. -- (1) The provisions

of §§ 14.301 (e) and 14-303 of this subtitle and subsections (a) and (b) of this section are inapplicable to the extent that any of the primary procurement units determines the provisions to be in conflict with any applicable federal program requirement.

(2) The determination under this subsection shall be included with the report required under § 14-305 of this subtitle.

§ 14-303. Regulations by Board

(a) In general. -- (1) In accordance with Title 10, Subtitle 1 of the state Government Article, the Board shall adopt regulations consistent with the purposes of this Division II to carry out the requirements of this subtitle.

(2) The regulations shall establish procedures to be followed by units, prospective contractors, and successful bidders or offerors to maximize notice to, and the opportunity to participate in the procurement process by, a broad range of minority business enterprises.

(b) Required regulations. -- These regulations shall include:

(1) provisions designating one agency to certify and decertify minority business enterprises for all units through a single process that meets applicable federal requirements;

(2) a requirement that the solicitation document accompanying each solicitation set forth the expected degree of minority business

enterprise participation based, in part, on:

(i) the potential subcontract opportunities available in the prime procurement contract; and

(ii) the availability of certified minority business enterprises to respond competitively to the potential subcontract opportunities;

(3) a requirement that the unit provide a current list of certified minority business enterprises to each prospective contractor;

(4) provisions to ensure the uniformity of requests for bids on subcontracts;

(5) provisions relating to the timing of requests for bids on

subcontracts and of submission of bids on subcontracts;

(6) provisions designed to ensure that a fiscal disadvantage to the State does not result from an inadequate response by minority business enterprises to a request for bids;

(7) provisions relating to any circumstances under which a unit may waive obligations of the contractor relating to minority business enterprise participation; and

(8) other provisions that the Board considers necessary or appropriate to encourage participation by minority business enterprises and to protect the integrity of the procurement process.

CODE OF
MARYLAND REGULATIONS (COMAR)

TITLE 21
STATE PROCUREMENT REGULATIONS
Subtitle 05 Procurement Methods

Chapter 08 Mandatory Written Solicitation Requirements

* * *

.04 Minority Business Enterprise Participation Goal.

An MBE subcontract participation goal is a mandatory provision for each solicitation for contracts that will provide MBE subcontract opportunities under COMAR 21.11.03 except small procurements made under COMAR 21.05.07. The language may be varied but shall contain the following information:

"An MBE subcontract participation goal of -- percent of the total current amount has been established for this procurement. By submitting a response to this solicitation, the

bidder or offeror agrees that this amount of the contract will be performed by minority business enterprises."

SUBTITLE 11 SOCIOECONOMIC POLICIES

Chapter 03 Minority Business Enterprise Policies

.01 General - purpose

This chapter provides that maximum contracting opportunities be extended to certified Minority Business Enterprises, and establishes that:

A. Each designated department as defined in Regulation .03B(3), below, except the Department of Transportation as to construction contracts, shall structure its procedures for procuring supplies, services, maintenance, construction, construction-related services, architectural

services, and engineering services to attempt to achieve the result that a minimum of 10 percent of the total dollar value of these procurements is made directly or indirectly from certified minority business enterprises;

B. The Department of Transportation shall structure its procurements for procuring construction to attempt to achieve participation by certified minority business enterprises, in the amount of at least 10 percent of the dollar value of contracts in excess of $100,000 on the prime or subcontract level; and

C. Each procurement agency shall structure its procurement procedures to encourage a fair participation in the State procurement process by

certified minority business enterprises.

* * *

.09 A [omitted]

B. MBE Procurement Methods.

(1) Direct Solicitation. If known certified MBEs can provide the entire contract, then the certified MBEs may be solicited directly in accordance with Regulation .08A as part of the solicitation process being employed for the business community in general. The solicitation and solicitation notice shall comply with COMAR 21.05.08.03.

(2) MBE Subcontract Method.

(a) Notwithstanding whether a direct solicitation is made under § B(1), above, all Department of Transportation construction contracts in excess of $100,000 and

all other construction contracts in excess of $50,000, shall contain a certified MBE subcontract participation goal, expressed as a percentage of the dollar value of the contract, that should be attempted to be subcontracted to certified MBEs. A designated department or procurement agency may establish a certified MBE subcontract goal for a particular construction contract of $50,000 or less, or any supply, maintenance, service, construction-related service, architectural service, or engineering service contract.

(b) Solicitation Content. Each solicitation identified by a designated department or procurement agency as having subcontract opportunities shall contain the

clauses required by COMAR 21.05.08.03 and .04.

(c) A bidder or offeror shall submit with its bid or proposal a completed certified MBE utilization affidavit on a form provided by the appropriate designated department or procurement agency.

(d) The names of prime contractors requesting or purchasing solicitation documents for construction contracts shall be made available on request to any certified MBEs whose specialty suggests an interest in subcontracting.

(e) Each prime contractor given solicitation documents as part of a procurement under the MBE subcontract method, and who does not have an updated Central Directory shall be given, upon request, one

copy of the Directory or the pertinent portions for purposes of soliciting subcontract quotations, bids, or offers from certified MBEs.

(3) Combination Procurement Method.

(a) A combination of direct solicitation and the MBE subcontract methods, pursuant to § B(1) and (2), may be used when the designated department or procurement agency decides this method will be most likely to achieve the greatest degree of certified MBE participation.

(b) The solicitation documents shall comply with COMAR 21.05.08.03 and .04.

(4) Pre-bid and Pre-proposal Conferences. When pre-bid or pre-proposal conferences are held,

the designated department or procurement agency shall explain the certified MBE subcontracting goal if applicable, the MBE provisions of the solicitation, the documentation required and its relationship to the determinations that will be made in connection with the evaluation process.

* * *

.10 Contract Award

A. General.

(1) In the event of tie bids, or of offers in which the evaluation of technical and price proposals are essentially equal, a designated department or procurement agency may award the contract, in accordance with COMAR 21.05.02.14 or 21.05.03. 03C(6), as applicable, in

order to obtain certified MBE participation.

(2) In exercising its delegation or control authority over contracts, the Department of General Services and the Department of Budget and Fiscal Planning may require all determinations under this regulation and Regulation .11 to be made before execution of a contract, or approval by the control agency, or both.

(3) An MBE prime contractor responding to the solicitation shall, if awarded the contract, accomplish an amount of work not less than the MBE subcontract goal with his own work force, MBE subcontractors, or both in combination. The documentation requirements of § A(5), below, are applicable only if MBE subcontractors are to be utilized in the

performance of the contract. The MBE prime contractor shall, however, be certified or submit an MBE affidavit and apply to be certified in accordance with § B(4), below.

(4) Each bid or offer submitted in response to this solicitation shall be accompanied by a completed MBE utilization affidavit, on forms provided by the procurement agency, whereby the bidder or offeror acknowledges the MBE participation goal and commits to make a good faith effort to achieve the goal.

(5) Documentation. The following documentation shall be considered as part of the contract, and shall be furnished by the apparent successful bidder or offeror to the procurement officer within 10 working days from notification that

he is the apparent successful bidder or offeror or within 10 working days following the award, whichever is earlier. If the contract has been awarded and the following documentation is nor furnished, the award shall be null and void.

(a) A completed schedule of participation naming each MBE who will participate in the project that describes the:

(i) contract items to be performed or furnished by the MBE and the proposed timetable for performance; and

(ii) Agreed prices to be paid to each MBE for the work or supply.

(b) If the apparent successful bidder or offeror is unable to achieve the contract goal

for MBE participation, the apparent successful bidder or offeror may submit instead of or in conjunction with the schedule of participation a request in writing for a waiver as provided in Regulation .11.

(c) An MBE subcontractor project participation statement signed by both the bidder or offeror and each MBE listed in the schedule of participation which shall include:

(i) A statement of intent to enter into a contract between the prime contractor and each subcontractor if a contract is executed between the procurement agency and the prime contractor, or if the prime contract has been awarded, copies of the subcontract agreement or agreements; and

(ii) The amount and type of bonds required of MBE subcontractors, if any.

(d) A completed and signed MBE affidavit for any MBE prime contractor and for each MBE identified in the schedule for MBE participation provided that the bidder, offeror, or subcontractor is not already certified by the State Minority Business Certification council or the Department of Transportation under COMAR 21.11.03.15 or 21.11.03.16.

(e) An affidavit completed and signed by the prime contractor stating that, in the solicitation of subcontract quotations or offers, MBE subcontractors were provided not less than the same information and amount of time to

respond as were non-MBE subcontractors, and that the solicitation process was conducted in such manner as to otherwise not place MBE subcontractors at a competitive disadvantage to non-MBE subcontractors.

(f) Any other documentation considered appropriate by the designated department or procurement agency to ascertain bidder or offeror responsibility in connection with the contract MBE participation goal.

(g) The contractor, by submitting his bid or offer, consents to provide that documentation requested by the designated department or procurement agency pursuant to COMAR 21.11.03.13, and to provide right of entry at any reasonable time for purposes of the State's represen-

tatives verifying compliance with the MBE subcontractor requirements.

B. Contracts Involving Subcontracts.

(1) A contract involving subcontracts shall be subject to the designated department's or procurement agency's concluding that the apparent successful bidder or offeror meets the applicable certified MBE participation provisions contained in the solicitation.

(2) The apparent successful bidder or offeror shall within 10 working days from the date of award of the contract or notification that it is the apparent successful bidder or offeror, whichever is earlier, submit the documentation described by § A(5).

(3) Nothing in this regulation is intended to preclude the award of a contract conditionally upon receipt of the documentation specified in § B, above.

(4) Whenever an uncertified minority business is identified for contract award, or in the schedule for subcontract participation required under § A(5) (a), the designated department or procurement agency shall forward the affidavit of the minority business to the appropriate certification entity for certification consistent with Regulations .15 and .16 of this chapter. A contract may be awarded notwithstanding the pendency of certification. The certification entity shall notify promptly the designated department or procurement agency of its disposi-

tion. In the event of an unfavorable disposition, the designated department or procurement agency shall include that fact as part of its annual report and may not, in the future, treat that business entity as an MBE until it is certified.

C. If a designated department or procurement agency determines that the apparent successful bidder or offeror has not complied with the certified MBE subcontract participation contract goal, and has not obtained a waiver in accordance with Regulation .11, below, or if the bidder or offeror fails to submit the documentation required by the solicitation, the procurement officer, upon review by the Office of the Attorney General and approval of the agency head having jurisdiction over the

contract, may reject the bid or offer or cancel the award of the contract. The reasons for this action shall be specified in writing and mailed or delivered to the bidder or offeror.

.11 Waiver

A. If, for any reason, the apparent successful bidder or offeror is unable to achieve the contract goal for certified MBE participation, the bidder or offeror may request, in writing, an exception to the goal with justification to include the following:

(1) A detailed statement of the efforts made to select portions of the work proposed to be performed by certified MBEs in order to increase the likelihood of achieving the stated goal;

(2) A detailed statement of the efforts made to contact and negotiate with certified MBEs including:

(a) The names, addresses, dates, and telephone numbers of certified MBEs contacted, and

(b) A description of the information provided to certified MBEs regarding the plans, specifications, and anticipated time schedule for portions of the work to be performed;

(3) As to each certified MBE that placed a subcontract quotation or offer that the apparent successful bidder or offeror considers not to be acceptable, a detailed statement of the reasons for this conclusion; and

(4) A list of minority subcontractors found to be unavailable.

This list should be accompanied by an MBE unavailability certification signed by the minority business enterprise, or a statement from the apparent successful bidder or offeror that the minority business refused to give the written certification.

B. A waiver of a certified MBE contract goal may be granted only upon a reasonable demonstration by the bidder or offeror that certified MBE participation was unable to be obtained or was unable to be obtained at a reasonable price and if the agency head or designee may consider engineering estimates, catalogue prices, general market availability, and availability of certified MBEs in the area in which the work is to be performed, other bids or offers and subcontract bids or offers substan-

tiating significant variances between certified MBE and non-MBE cost of participation, and their impact on the overall cost of the contract to the State and any other relevant factor.

C. An agency head may waive any of the provisions of Regulations .09-.10 for a sole source, expedited, or emergency procurement in which the public interest cannot reasonably accommodate use of those procedures.

D. When a waiver is granted, except waivers under § C, one copy of the waiver determination and the reasons for the determination shall be kept by the MBE Liaison Officer with another copy forwarded to the Office of Minority Affairs.

McLEAN CONTRACTING COMPANY

July 6, 1988

The Maryland Highway Contractors
Association, Inc.
Suite 707, Empire Towers
7300 Ritchie Highway
Glen Burnie, MD 21061

Gentlemen:

As requested, we are pleased to provide you with some of the problems we have encountered and the causes thereof in dealing with the Minority Business Enterprise Program.

The basic problem of the majority of minority subs we have dealt with is that the firms are not operated by full-time business and/or financially educated or experienced people. Usually the principals have construction experience but their business/finance expertise comes from part-time lawyers or family members. Although we strongly believe that the majority of minority firms are sincere and want to

perform well, the problem is obvious. Without a basic business/finance background they are in trouble from the start.

Minority firms are generally undercapitalized. Therefore, the firms need constant financing from the prime contractor. Many times, at the beginning of a project, the minority firm confronts the prime contractor with an ultimatum of either providing financing or they cannot perform the job. The types of financing are listed below:

1. Advances

2. More frequent partial payments than what the Contract requires

3. Weekly payroll payments

4. Guarantees to material and/or equipment suppliers

We will assist firms with the financing above, except for advances, because it is our obligation under the affirmative action. However, we naturally want to

protect ourselves the best way we can from being caught in a position where we have paid more to a sub than the amount of work performed. To protect ourselves we will demand certified payrolls before a weekly payroll is issued. Unfortunately, in some cases, this did not prevent non-payment to the employees and in other cases non-payment of union dues. In each instance our payment bond was attacked resulting in a duplicate payment for the same service. We will guarantee material suppliers by providing payment under a joint check after material has been delivered and payment authorized by the sub. In addition, we require the sub to come to our office to endorse the check, then we forward it to the supplier directly. Prior to this procedure joint checks were mailed to the subs and in some cases the checks were lost and another time a check was forged and

deposited by the sub. When a material supplier checks the credit rating of a minority sub many times the firm is new and does not have any credit history or the firm has bad credit. Therefore, the guarantees are necessary; but, by guaranteeing suppliers, the subs never establish a credit rating of their own. Although the paper work can be a burden for the prime contractor, we prefer joint check guarantees to eliminate, as much as possible, claims against the payment bond. To provide ourselves with additional protection, we have all of our subs complete a notarized affidavit after each partial payment to certify that all indebtedness has been discharged. Many times after a sub has been paid we find these affidavits were fraudulently signed. When paying subs more frequently than once a month we constantly measure the amount of work

performed to be sure we do not over-pay. In this instance the State Inspectors are of no help because they will not approve the work except once a month and, of course, they always have the right to reject the work any time before final payment. So a minority sub receives his needed money with little or no retainage withheld than is asked at a later date to return to replace work that has been rejected by the State Inspector. Since the sub has already spent his money, he cannot afford to replace the work that has been subsequently rejected, therefore, the prime contractor is left holding the bag.

Another common problem is that minority firms consistently fall behind schedule. Since the general is responsible to complete on time, assistance must be provided to avoid penalties and damage to your own firm's name. Unfortunately, in

many cases, we can not backcharge a minority sub fully for this assistance because they would end up owing us money.

Naturally, if we were allowed to make our own business decisions as to who should receive a subcontract, many of these minority firms would not be chosen; because we could avoid the special financing requirements, additional administration, and assistance at the site, all of which cost us additional money. Since we must find a way for this program to work more effectively, we suggest the following:

1. Let a prime contractor be allowed to require a performance and payment bond from a minority subcontractor that is new or questionable the same as would be done on a comparable non-minority firm. This would take the burden off of the prime contractor and place it on a bonding company which is more qualified to analyze

a firm's qualifications. If the sub cannot obtain a bond, this should be part of the criteria used to evaluate a waiver of the goal.

2. Secondly, the State of Maryland should adopt the program provided by the Virginia DOT, whereby they compensate a prime contractor up to 15% of the sub's contract price for documented managerial and/or administrative type assistance provided to the minority sub by the prime contractor.

3. Take the burden of financing subs off of the prime contractor. If a sub can not finance his own work, either in-house, through a financial institution, or government agency, the prime should be able to discharge the sub without an obligation to replace them. Government agencies certainly concur that a minority sub can be discharged for just cause, but by demanding

a replacement the prime will probably suffer additional losses by unknowingly finding another sub with similar problems or by paying a higher price than what was anticipated at bid time.

In another area of the program we suggest changes to the Quarterly Participation Report. Currently when completing this form, the total dollars paid is reported based on when the check clears the bank, not when it is issued. No accounting records are kept based on when checks clear, therefore, we are perplexed as to why it cannot be based on when the check is issued which would certainly be easier to maintain. Also, when submitting the report, copies of both sides of the cancelled checks must be attached. This requires someone to go through bank reconciliations every month which is time-consuming and costly. Why can't we just

provide a copy of the check which could easily be done when the check is issued? If there is any later doubt or questions as to the validity of the report, then copies of the cancelled checks could be provided as needed.

The City of Baltimore requirements create an additional problem. Currently when submitting a bid for the City, the bidder must state which minority firms they intend to use (including female business which is still a separate goal) and the dollar amount of each contract at the time of bid. Prior to the bid submission the bidder is responsible to verify that the minority sub is qualified as such. Since the bidding process can become hectic during the last hours when sub prices are received, this verification procedure places additional burdens on the bidder. Recently we were low bidder on approxi-

mately a $5,000,000 project with the City by $930,000, but one of the female businesses listed in our bid package accidentally allowed their certification to expire one month before the bid date. Although the firm was listed in the City's current publication of viable minority firms, our bid was rejected. We strongly suggest that the low bidder be allowed to submit his minority package within five days following the bid date as is currently required by the State of Maryland. This would allow for verification of the status of the minority firm and revision of the minority package, if necessary.

Although we have described several problems with minority firms, we certainly recognize that there are good, qualified firms in the market place, but unfortunately they are few and far between. We have been committed to supporting the Minority

Business Program over the years by providing assistance beyond the requirements. In 1986 we were awarded the Corporate Award for the U.S. Department of Commerce for supporting the ideals of Minority Business Enterprises, one of only 10 firms and the only contractor to receive such an award. However, even we are losing faith in the program because we have absorbed too much of the cost of educating and financing these firms over the years. We prefer to be in the contracting business and would like to see the government take a more active role and place less burden on the prime contractor for providing needed services to the minority firms.

If we can be of any further assistance, please advise.

Yours very truly,

McLEAN CONTRACTING COMPANY

Frederick W. Rich
Vice President & Treasurer

(2)

No. 91-294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

RALPH S. TYLER, III*
Deputy Attorney General

ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(301) 576-6342

Attorneys for Respondents

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals hold correctly that this case is moot because the statute challenged in this case has been repealed?

2. Alternatively, does petitioner, a membership association of construction companies, lack standing to challenge Maryland's Minority Business Enterprise law because neither petitioner nor any of its members has suffered any injury fairly traceable to that law, and because the declaration of unconstitutionality that petitioner seeks in this case will have a definite adverse impact on some of its members?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes and Regulations

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-294

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

A. Proceedings below.

The sole plaintiff (and now petitioner) in this case, the Maryland Highway Contractors Association, Inc. (the "Association" or "petitioner"), filed this suit in the United States District Court for the District of Maryland seeking declaratory

and injunctive relief against the State of Maryland and several state officials (collectively the "State), claiming that Maryland's Minority Business Enterprise ("MBE") statute violates the Association's federal constitutional and statutory rights. (App. at 4a-5a.)[1] In its complaint, the Association asserted that the MBE law unlawfully discriminates against the Association and its members on the basis of race and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 2000d. (App. at 32a.)

The State answered the complaint and immediately conducted discovery aimed principally at the question of the Association's Article III standing to sue. Upon completion of that discovery, the State filed a motion for summary judgment

---

[1] Citations in the form "App. at ___" are to the appendix to the Petition for Certiorari.

challenging, inter alia, the Association's standing. (App. at 32a.) The district court held a hearing on the State's motion and thereafter issued a detailed opinion dismissing this case because the undisputed facts established the Association's lack of standing. (App. at 30a-70a.)

Shortly after judgment was entered against the Association, but before the Association noted an appeal, the statutue challenged in this case was repealed and a new MBE statute became effective. 1990 Md. Laws Ch. 708, codified at Md. Ann. Code, State Finance and Procurement Art., §§ 14-301, et seq. (1990 Cum. Supp.). On appeal, the Fourth Circuit held that this case is moot because the Association's complaint challenged a law which was no longer in effect. (App. at 13a.) The appellate court went further, however, and addressed "the issue of standing in order to guide

subsequent litigation" and concluded that "the district court correctly found that the Association lacked standing to sue under the present facts." (App. at 29a.) The petition to this Court followed.

B. The challenged (and now-repealed) statutory scheme.

It is beyond dispute that the only statute challenged in this case was repealed as of July 1, 1990. That now-repealed MBE law required that certain units of State government have procurement procedures to encourage participation by certified MBEs, and attempt to provide to MBEs a "fair share" of state contracts for the procurement of supplies and services. Md. Ann. Code, State Finance and Procurement Article, § 14-302(a)(1), (2). Specifically, various State agencies were to structure procurement procedures that "try to achieve the result that a minimum of 10% of [their] total dollar value of procurement contracts is made

directly or indirectly from certified minority business enterprises." Id., § 14-302(b)(1). With respect to contracts at the State Department of Transportation, this goal applied only to contracts in excess of $100,000. Id., § 14-302(b)(2).

The law in effect when this action was filed defined a qualifying minority business as any legal entity that is at least 51% owned or controlled by one or more members of a group "that is disadvantaged socially or economically, including: 1. Alaskan natives; 2. American Indians; 3. Asians; 4. Blacks; 5. Hispanics; 6. Pacific islanders; 7. women; or 8. physically or mentally disabled individuals." § 14-301(e).[2] The State's MBE regulations required that each contract solicitation set forth the expected degree of

---

[2] The present MBE law has changed the definition of an MBE. See 1990 Md. Laws Ch. 708; App. at 10a.

MBE participation; that the affected state agency provide a list of certified MBEs to each prospective contractor; that there be uniformity of requests for bids on subcontracts and of the timing of requests and submissions of bids on subcontracts; and that the State not be fiscally disadvantaged by an inadequate response by MBEs to requests for bids. § 14-303(b); Code of Maryland Regulations (COMAR) 21.11.03.01 et seq.[3]

C. The undisputed facts, all of which were obtained in discovery from the Association, show that Maryland's MBE law has had no adverse impact on the Association or its members.

The State conducted discovery to determine whether the Association had

---

[3] The regulations also set forth the circumstances in which MBE participation may be waived. § 14-303(b)(6). To receive a waiver, the contract bidder or offeror must make a reasonable demonstration that MBE participation is not obtainable, or is not obtainable at a reasonable price, and the state procurement agency must decide that the public interest would be served by a waiver.

standing to bring this action. (App. at 5a.) In that discovery, the Association explicitly - and repeatedly - stated that it had no evidence that anyone, let alone it or any of its members, has been injured by Maryland's MBE law.

For example, in answers to the State's interrogatories and in response to the State's request for production of documents, the Association stated that (1) it had no information concerning any member who may have lost a bid on a contract for the procurement of supplies and/or services as a result of the statute challenged in this action (App. at 19a; 51a); (2) it had no information concerning any profits lost as a result of any particular member's failure to be awarded a contract or subcontract because of the MBE statute (id.); and (3) it had no documents reflecting direct economic or business injuries to it or its members.

(App. at 19a; 44a.)

In addition, the Association's Executive Director, Robert E. Latham, testified under oath at deposition that the Association had no evidence that it lost any membership dues as a result of the MBE law and he agreed that any claim to the contrary would be "sheer speculation" (App. at 44a); Mr. Latham testified that rather than being harmed by the MBE law, in fact, the Association has been a beneficiary of the law as it gained a member, in its highest dues category, as a result of this challenge. (App. at 16a; 44a.) Mr. Latham also conceded that the Association had no data or any other evidence showing that Maryland's MBE law resulted in higher costs to anyone (App. at 52a); the Association had not undertaken any study to show that Maryland's law detrimentally affected non-MBE contractors (App. at 19a); and the Association had not been able to

identify any of its members who was denied a contract as a result of the law it challenged. (App. at 19a; 51a.)

D. The decisions below.

After noting that the State's challenge to the Association's standing "is not based solely on the pleadings", but rather "the parties have conducted extensive discovery on the issue of standing" (App. at 42a), the district court held that the Association had no standing to challenge Maryland's MBE law. Based on the evidence produced by the Association in response to the State's discovery, the court granted the State's motion for summary judgment, holding that the Association "failed to demonstrate any economic or non-economic injury to itself as a result of the challenged . . . statute . . . ." (App. at 49a.) The district court found that "the Association has failed to demonstrate that . . . [its] members have

suffered any kind of actual injury, or even suffer any threat of actual injury, as a result of being subject to the MBE statute." (App. at 60a) (emphases in original). Accordingly, the district court found that it lacked subject matter jurisdiction, and thus entered judgment in favor of the State and against the Association. (App. at 69a.)

On appeal, the Fourth Circuit found that "[i]n the interim between the district court's decision and this appeal, the Maryland legislature repealed the MBE statute at issue here and replaced it with a new one." (App. at 4a.) The Court of Appeals specifically found that the State attempted to comply with this Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), by, for example, commissioning a post-Croson Minority Business Utilization Study, holding legislative hearings, and

making findings regarding discrimination in the award of State contracts. (App. at 8a-10a.) The court below vacated the district court's decision, with instructions to dismiss the case, because "the actions by the Maryland legislature had the effect of rendering the Association's case [in which it challenged a then-repealed law] moot." (App. at 11a.)

Additionally, because it believed that a future challenge to the State's newly-enacted (but not here challenged) MBE statute was likely (App. at 14a), the Fourth Circuit addressed the standing issue and affirmed the district court's holding that the Association lacked standing to sue because neither it nor its members suffered any injury as a result of the challenged law. (App. at 15a-25a.) The court also found that even if such an injury existed, the Association had no standing to sue on behalf of its members

because some of those members would be harmed, while others would be benefited, if the MBE statute were invalidated; therefore, "there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their [conflicting] interests." (App. at 27a.)

REASONS FOR DENYING THE WRIT

The Petition Does Not Present A Substantial Federal Question

Because the decision below conforms with prior decisions of this Court, further review of this case is unwarranted. Simply put, this is a factually unique case which raises no novel or unsettled questions of federal law on which the lower federal courts require the guidance of this Court. Indeed, some of the questions presented in the petition are so manifestly insubstantial (e.g., whether the Fourth Circuit erred in finding that a hearsay letter could not defeat the State's summary judgment motion (Pet. at 42-44)),

that they require no answer in this brief.

A. The Statute Challenged In This Case Has Been Repealed And A New Statute Has Been Enacted; Therefore, This Case Is Moot.

The Association does not dispute the Fourth Circuit's finding that the MBE statute it challenges was repealed and replaced with a new statute effective July 1, 1990, after the district court had dismissed this case. (App. at 4a; 8a-13a.) The Association also does not dispute that it never sought any post-judgment relief to amend its complaint to challenge the now-effective law and that it has not since filed any such challenge. Therefore, this case is moot and there is no reason for this Court to exercise its discretionary jurisdiction to review the matter further, particularly in light of the Association's undisputed ability to file a challenge to the new MBE law (assuming, arguendo, that it has standing to do so). See Fusari v. Steinberg, 419 U.S. 379, 387

(1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972); United States v. Munsingwear, 340 U.S. 36, 39 (1950).

B. In Any Event, As The Court Of Appeals Found, The Association Lacks Standing To Challenge The Constitutionality Of Maryland's MBE Law Because The Association Has Suffered No Injury As A Result Of That Law.

Further, there is not a scintilla of evidence of harm to the Association or its members fairly traceable to the now-repealed MBE law challenged in this case. "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III . . . . As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of

federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498 (1975) (emphasis in original).

Therefore, "when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 28 (1976).

When, as in this case, an association is the only plaintiff, it "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. at 511. An association may also have standing if three conditions are satisfied: "(a) its members would otherwise have standing to sue

in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). In either case, however, the association, as with any other plaintiff, must show it has sustained a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 750 (1984) (emphasis added).

The present petition, as with the Association's prior submissions in the district court and the Court of Appeals, reflects a fundamental misunderstanding of both standing doctrine and the essentially different functions a district court performs when reviewing a motion to dismiss, as

opposed to a motion for summary judgment, which the State filed here after conducting extensive discovery on the standing issue.

When standing is challenged on a motion to dismiss, the court " 'accept[s] as true all material allegations of the complaint, and . . . construe[s] the complaint in favor of the complaining party.' " Pennell v. City of San Jose, 108 S.Ct. 849, 855 (1988) (citation omitted). See also, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689-90 (1973). But this presumption that an allegation is true disappears, however, when, as here, the court reviews a properly supported summary judgment motion because then general allegations of harm are insufficient to overcome defendants' contrary summary judgment showing. See generally Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

This Court recently held that general allegations of injury are insufficient to oppose a properly supported summary judgment motion based "on the ground that the plaintiff has failed to show that he is 'adversely affected or aggrieved' " by allegedly unlawful behavior. Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 3186 (1990). Once the moving party meets its burden of showing that "there is an absence of evidence to support the nonmoving party's case," Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), the nonmoving party (here, the Association) must set forth specific facts, rather than "general averments", to withstand a properly supported summary judgment motion. See Lujan, 110 S.Ct. at 3188-89.

Both courts below found that the undisputed material facts demonstrated that (1) the Association had come forward with no

evidence that it had been injured by the MBE law (App. at 16a; 43a-44a); and (2) the Association had, in fact, benefited from the MBE law as at least one contractor joined the Association (and now pays a substantial amount in annual dues) precisely because the Association filed this suit (App. at 16a; 44a); and (3) none of the Association's members had been harmed by the MBE law as not one of its members lost a contract, lost a bid for a contract, nor lost any profits as a result of the MBE law (App. at 19a; 51a); and (4) the Association had no evidence that the State's law had any discriminatory impact on anyone. (App. at 20a; 23a; 44a-49a; 51a;-53a; 56a.)

In sum, the Court of Appeals' application of this Court's well-elaborated standing principles was entirely correct and the petition fails to show why further review of this factually unique and legally

unremarkable case is warranted.

C. Furthermore, Again As The Court of Appeals Found, The Association Lacks Standing To Sue In A Representative Capacity Because There Is A Direct Conflict Of Interest Between The Association's Litigation Objective And The Interests Of Its Minority Members.

In addition, the Association lacks standing to sue on behalf of its members because, as the Fourth Circuit found, it fails to satisfy the third condition of Hunt associational standing. (App. at 25a-29a.) That prong requires that neither the claim asserted nor the relief requested necessitates the participation of individual members in the lawsuit. See Hunt, 432 U.S. at 343.

The only plaintiff in this case is the Association, which purports to sue in a representative capacity. On the undisputed facts, the Fourth Circuit found that there is a direct conflict of interest between the

Association's minority members who "benefit from the continued enforcement of the MBE statute," and "[o]ther non-minority members of the Association [who] would benefit if the MBE statute were declared unconstitutional." (App. at 27a.) As the Court of Appeals held, this conflict, which was highlighted by the Association's exclusively non-minority Board's totally secretive process in filing this suit (App. at 28a), prevented the Association from meeting the third prong of associational standing under Hunt. (Id.)

Petitioner argues incorrectly that the Fourth Circuit's decision conflicts with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986). See Petition at 34-37. In Brock, however, unlike here, no evidence of actual conflict

among the association's members was shown.[4] The Fourth Circuit's analysis and conclusion are, therefore, in full accord with Brock and with lower federal court decisions on this issue. See, e.g., Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684 (8th Cir. 1979); Mountain States Legal Foundation v. Dole, 655 F. Supp. 1424 (D. Utah 1987).

Contrary to Petitioner's suggestion, see Petition at 34-38, the decision below is not in conflict with other appellate decisions because none of those supposedly conflicting decisions addressed the types of actually identified, as well as potential, conflicts

---

[4] See 477 U.S. at 290 ("[W]ere we presented with evidence [as has been presented in this case] that such a problem existed here or in cases of this type, we would have to consider how it might be alleviated. However, the Secretary has given us absolutely no reasons to doubt the ability of the UAW to proceed here on behalf of its aggrieved members. . . .") (emphases added).

of interest that the Fourth Circuit found prevented this Association from suing as the sole plaintiff on behalf of all of its members.[5]

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

RALPH S. TYLER, III*
Deputy Attorney General

ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(301) 576-6342

Attorneys for Respondents

*Counsel of Record
A:DPC:AHB9177

---

[5] In any event, because this case is moot and because the Association lacks standing as it has suffered no injury fairly attributable to the now-repealed MBE law, this case is not an appropriate vehicle for the Court to resolve any arguable conflict on this narrow issue.

No. 91-294 (3)

In The Supreme Court Of The United States

OCTOBER TERM, 1991

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REBUTTAL BRIEF

Leslie Robert Stellman,
Counsel of Record for Petitioner,

John W. Kyle,
LITTLER, MENDELSON, FASTIFF & TICHY
The World Trade Center
Suite 1653
Baltimore, Maryland 21202-3005

Counsel for Petitioner

Walter H. Ryland,
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS
Two James Center
1021 East Cary Street
Richmond, Virginia 23219

Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

I

Questions Presented For Review

1. Does the recent ruling of the Third Circuit in Contractors Association of Eastern Pennsylvania v. City of Philadelphia conflict with the Court of Appeals' holding that because some of the Association's members would benefit from the challenged legislation the Association lacked standing?

2. Would Respondents' contention that the Association failed to establish injury in fact have the Court of Appeals impose an additional requirement for standing over and above that required by Article III?

Table of Contents

Table of Authorities

Cases

II

List of Parties Involved

Plaintiff

The Maryland Highways Contractors Association, Inc.

Defendants

State of Maryland

James J. McGinty, Secretary, Board of Public Works

Earl F. Seboda, Secretary, Department of General Services

Richard H. Trainor, Secretary, Department of Transportation

Joseph I. Shilling, Chairman, Interagency Committee on School Construction

Henry L. Hein, Chairman, Maryland Food Center Authority

Herbert J. Belgrad, Chairman, Maryland Stadium Authority

John S. Toll, Chancellor, The University of Maryland System

Charles L. Benton, Director, Department of Budget and Fiscal Planning

No. 91-294

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, et al.,

Respondents.

PETITIONER'S REBUTTAL BRIEF

III

REPLY TO BRIEF IN OPPOSITION

Petitioner files this Rebuttal Brief to bring an intervening decision to the Court's attention and to reply to certain issues raised in the Brief In Opposition.

Argument I

The recent ruling of the Third Circuit in Contractors Association of Eastern Pennsylvania v. City of Philadelphia conflicts with the Court of Appeals' holding that because some of the Association's members could benefit from the challenged legislation the Association lacked standing.

In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, Nos. 90-1295, 90-1296, September 30, 1991, attached hereto as Addendum A, the Court addressed the issue of associational standing in a challenge to a public procurement policy that conferred preferences on the basis of ethnic or racial characteristics. As part of that analysis, the Court considered the circumstances in which conflicts of interest between an association and its members could impact standing. The discussion appears on pages A-12 through A-17 of the Addendum to this brief.

The Third Circuit held that,

> "The Contractors' position in this litigation is not contrary to the interests of a majority of their members, and there is nothing on this record indicating that they failed to follow their own internal rules before joining this litigation. Therefore the City's argument fails and we hold that Contractors have associational standing to maintain the present action."

Addendum at A-17.

The District Court declined to address the impact of potential conflicts of interest between the members and the Association. (App. A-67). The Fourth Circuit raised this for the first time (App. A-25) and concluded that

> "Because of the actual conflict of interest and the potential for conflict in this case, the Association has failed to meet the third prong of the Hunt test."

(App. A-28).

The Fourth Circuit thus adopted a rule that if some members might object to the goals of the litigation, the conflict is of a magnitude that defeats the Association's standing. The Third Circuit's test is more reasonable and better reflects the tenor of the precedents cited by both Circuits.

The Fourth Circuit's ruling poses an insurmountable barrier to associational standing in most cases. The Petition should be granted to address this conflict between the circuits.

Argument II

Respondents' contention that the Association failed to establish injury in fact would have the Court of Appeals impose an additional requirement for standing over and above that required by Article III.

This case is not one in which the Association failed to carry its burden of

proof to establish that its members suffered injury. Rather, it is a case in which, if the argument in the Brief in Opposition is accepted, the lower courts would be imposing a barrier to standing in excess of that required by Article III of the Constitution.

The lower courts imposed an unduly strict burden of proof on the association. The trial court resolved conflicting issues of fact on motion for summary judgment.

> On summary judgment it is not necessary that the issue of material fact be conclusively resolved in favor of the party asserting its existence; rather all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

First National Bank v. Cities Service Co., 391 U.S. 253, 288-89 (1968).

The trial court relied on language in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986), to the effect that a jury needed to find in favor of the Association based on a preponderance of the evidence. (App. A-22, 23). In holding that the association failed to carry this burden of proof, the lower courts have placed a double burden on the plaintiff. First, it must establish the existence of disputed issues of material facts on the question of standing. Then, before proceeding to trial, it must prove to the judge as trier of fact that it prevails on those issues. The jury could find from a preponderance of the evidence that the Association's members were damaged by the Act.

The Association introduced evidence of both non-economic and economic injury.

A. Non-economic Injury

A party may establish standing by raising claims of non-economic injury. ASARCO Inc. v. Kadish, 490 U.S. 605, 616 (1989). (Kennedy, J.) Here, the Association alleged that the racial and ethnic preferences provided in the Maryland statute were adopted neither as a remedy for past discrimination nor narrowly tailored to address past discrimination. The Association sought declaratory and injunctive remedies to relieve its members of the obligation to engage in unlawful preferences.

Standing may exist for one purpose and not another. The Association was not seeking damages and did not claim that any member had been damaged by losing a contract or being excluded from bidding. Economic damage is the reason most suits

are filed. However, the usual economic damage need not occur as long as the parties comply with the law that creates the preference. The low bidder gets the job and if the other bidders satisfy the requirements of the law, there is no reason to assume that they lost the contract because of the cost of compliance. There is ample precedent for the State and private parties to cooperate in enforcing an otherwise unconstitutional law without damage to the private parties. The Fourth Circuit should not impose the task of establishing economic damage on a party who seeks to resist its compelled participation in an unconstitutional governmental program.

The cases cited in our Petition identify the numerous cases in which plaintiffs had standing to sue as a result

of their participation in challenged programs. See ASARCO v. Kadish, supra, 490 U.S. at 616; Pennell v. City of San Jose, 108 S. Ct. 849 (1988).

B. Economic Injury

The Association did assert that its members incurred increased costs as the result of their required participation in the preference programs.

When asked by counsel for the State for information from the Association's members on increased costs, the Association's Executive Director produced the McLean letter (App. A-106). This letter noted that claims had been filed against McLean's payment bond and the "special financing requirements, additional administration, and assistance at the site, all of which cost us additional money." (App. A-111). The

letter suggested that Maryland should adopt Virginia's practice of reimbursing up to 15% of a subcontract price as the cost of providing such service. (App. A-112).

The State put the letter in the record as part of the Latham deposition, and the trial court first raised the question of its admissibility in its opinion (App. A-53). The Fourth Circuit erroneously held the letter to be "not admissible evidence". (App. A-53).

Conclusion

For all of the foregoing reasons, a writ of certiorari should issue and the judgment of the Court of Appeals should be reversed and remanded with instructions to permit Petitioner to amend its Complaint to attack the current version of the

Maryland MBE statute and to proceed to an expedited trial on the merits.

MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC., Petitioners

By Leslie Robert Stellman

Leslie Robert Stellman
Counsel of Record for Petitioner
John W. Kyle
LITTLER, MENDELSON, FASTIFF & TICHY
The World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005

Walter H. Ryland
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS
Two James Center
1021 East Cary Street
Richmond, Virginia 23210-1320
(804) 643-1991

ADDENDUM

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC., GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC., EMPLOYING BRICK LAYERS ASSOCIATION OF DELAWARE VALLEY, INC., INTERIOR FINISH CONTRACTORS ASSOCIATION, INC., MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC., ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC., SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC., NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. v. CITY OF PHILADELPHIA, ELIZABETH REVEAL, as Director of Finance for the City of Philadelphia, CURTIS JONES, JR., as Director of the Minority Business Enterprise Council; UNITED MINORITY ENTERPRISE ASSOCIATES, INC., Intervening Defendant; THE CITY OF PHILADELPHIA, Appellant at No. 90-1295; UNITED MINORITY ENTERPRISE ASSOCIATES, INC., Appellant at No. 90-1296

Nos. 90-1295, 90-1296

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1991 U.S. App. LEXIS 22718

November 16, 1990, Argued
September 30, 1991, Filed

PRIOR HISTORY:

On Appeal from the United States District Court for the Eastern District of Pennsylvania; (D.C. Civil Action No. 89-02737).

COUNSEL: Charles W. Bowser, Esquire (Argued), James P. Cousounis, Esquire,

Bowser, Weaver & Cousounis, P.C., Philadelphia, Pennsylvania and Charisse Lillie, Esquire, City Solicitor, Philadelphia, Pennsylvania, Attorneys for City of Philadelphia.

Robert T. Vance, Jr., Esquire (Argued), Brown, Vance, Jackson & Smith, Philadelphia, Pennsylvania, Attorney for United Minority Enterprise Associates, Inc.

John J. McAleese, Jr., Esquire (Argued), Thomas J. McGoldrick, Esquire, John H. Widman, Esquire, McAleese, McGoldrick & Susanin, P.C., King of Prussia, Pennsylvania, Attorneys for Appellees.

JUDGES: Greenberg, Hutchinson, and A. Leon Higginbotham, Jr., * Circuit Judges. A. Leon Higginbotham, Jr., Circuit Judge, concurring in judgment.

*At the time of argument, Judge Higginbotham was Chief Judge but has since assumed Senior status.

OPINION BY: HUTCHINSON

OPINION: OPINION OF THE COURT

The City of Philadelphia (City) and United Minority Enterprise Associates, Incorporated (Minority Associates) appeal an order of the United States District Court for the Eastern District of Pennsylvania granting appellee Contractors Association of Eastern Pennsylvania, Incorporated, and other trade associations with members that do business in the construction industry in the Philadelphia metropolitan region (collectively "Contractors"),[1] summary judgment on Contractors' claim that Chapter 17-500 of the Philadelphia Code (Ordinance), Philadelphia's public contract set-aside law, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See Contractors Ass'n of E. Pa., Inc. v. City of Phila., 735 F. Supp. 1274 (E.D. Pa. 1990). Among other contentions, Minority Associates

argues that the district court erred by granting the Contractors' motion without giving Minority Associates a chance to pursue additional discovery on the existence of discrimination in the Philadelphia construction market that could justify the various set-asides in the Ordinance. Minority Associates' opposition to Contractors' motion for summary judgment was accompanied by a Federal Rule of Civil Procedure 56(f) affidavit. The affidavit stated that Minority Associates needed time to undertake further discovery. We think Minority Associates should have been given a reasonable opportunity for further discovery and will therefore vacate the district court's order granting Contractors' summary judgment and remand

for further proceedings consistent with this opinion.

I.

This appeal concerns claims Contractors made in an amended complaint dated May 19, 1989 that was filed in the district court in their suit to strike down Chapter 17-500 of the Philadelphia City Code and the regulations promulgated under that Ordinance as contrary to the United States and Pennsylvania Constitutions and federal and state statutes guaranteeing them, inter alia, equal protection of the laws. The City filed an answer as did Minority Associates, an intervening defendant. On October 11, 1989, the City moved for judgment on the pleadings or, alternately, summary judgment on the grounds that

Contractors lacked standing to sue and did not state a cause of action under the Equal Protection Clause, 42 U.S.C.A. §§ 1983 (West 1981) and 42 U.S.C.A. § 1981 (West 1981). The City also moved for judgment on the pleadings on the state law claims alleging that if the federal claims were dismissed the court would lack pendent jurisdiction. The Contractors replied and filed a cross-motion for summary judgment on its Equal Protection Clause and section 1983 claims.

The City opposed Contractors' cross-motion for summary judgment arguing mainly that genuine issues of fact remained to be resolved. Minority Associates joined the City's opposition and asked for a continuance so that discovery could be completed before the Contractors' motion was ruled on.

On April 5, 1990, the district court granted Contractors' cross-motion, denied the City's motion, declared the minority-, female- and handicapped-owned business enterprise set-aside programs set forth in the Ordinance and the implementing regulations unconstitutional and permanently enjoined the City from enforcing or implementing the Ordinance or the regulations. The City filed its notice of appeal on April 10, 1990, and Minority Associates filed its notice of appeal on April 12, 1990.[2]

II.

The district court had subject matter jurisdiction over the section 1983 claim that the Ordinance violated Contractors' right to equal protection under 28 U.S.C.A. § 1331 (West Supp. 1991) and 28

U.S.C.A. § 1343(a)(3) & (4) (West Supp. 1991). We have appellate jurisdiction over the City's and Minority Associates' appeals from the district court's final order under 28 U.S.C.A. § 1291 (West Supp. 1991).

Our review of the district court's order denying the City's motion for summary judgment on standing and its order granting Contractors' motion for summary judgment on the merits is plenary. See Country Floors, Inc. v. A Partnership Composed of Gepner & Ford, 930 F.2d 1056, 1060 (3d Cir. 1991). We review the district court's refusal to postpone action on the Contractors' motion pending further discovery by Minority Associates for abuse of discretion. See Lunderstadt v. Colafella, 885 F.2d 66, 71-72 (3d Cir. 1989). If information concerning the

facts to be discovered is solely in the possession of the movant, however, "a motion for continuance of a motion for summary judgment or purposes of discovery should [then] ordinarily be granted almost as a matter of course." Ward v. United States, 471 F.2d 667, 670 (3d Cir. 1973) (citations omitted). The Ward rationale would not seem to apply, however, when the party seeking a discovery has the information it seeks in its own possession or can get it from a source other than the movant.

III.

The Ordinance in question is entitled "Goals For The Participation Of Minority, Female And Handicapped Owned Businesses In City Contracts." II Appendix (App.) at 310. Through various means, the Ordinance

seeks to increase the number of "Disadvantaged [*7] Business Enterprises" owned by minorities, women or handicapped persons who are awarded city contracts. A Disadvantaged Business Enterprise is any small business "which is at least 51 percent (51%) owned by one or more socially and economically disadvantaged individuals."[3] Id. at 311. The Ordinance creates an agency called the Minority Business Enterprise Council (the agency). The agency is charged with the administration of the Ordinance, which authorizes the agency to presume that all minorities, women and handicapped persons are socially and economically disadvantaged persons. Once a Disadvantaged Business Enterprise receives contract work of more than $5,000,000.00 from the City under the Ordinance, that

business is rebuttably presumed not to be disadvantaged. The Ordinance sets "goals" of fifteen-percent participation in city contracts for minority-owned businesses, ten percent for female-owned businesses and two percent for handicapped-owned businesses. Finally, the Ordinance contains provisions that allow the agency to waive its set-aside requirements in certain situations.

A.

We first address the City's standing claim because it goes to the subject matter jurisdiction of the district court. See Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2306 & n.13 (1991) (Court first addressed standing and ripeness claims that could impair the

Court's power to hear the case). The City contends that the Contractors lack standing for two reasons. First, the City said the Contractors did not establish that they suffered an injury-in-fact. Second, the City maintains that the Contractors cannot claim organizational standing because of conflicts of interest among the members of the organizations. We reject both challenges.

The Supreme Court of the United States has stated:

> The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party . . . . A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ."

Warth v. Seldin, 422 U.S. 490, 499 (1975) (citations omitted) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973)). An

association can have standing on the basis of direct injury against itself as an association. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976). Under certain circumstances, an association can also have standing on the basis of injury to its members.

An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). The district court determined that Contractors met Hunt's requirements. Contractors

Ass'n, 735 F. Supp. at 1281-87. We agree with its analysis.[4]

The City's second argument on standing merits more discussion. Because an association represents many individuals, the potential for conflict of interest exists among its members. The City notes that some of the Contractors' members qualify as disadvantaged businesses and actually oppose the litigation, and thus a conflict of interest exists that denies Contractors standing.

In considering whether a target corporation had standing to assert the interests of its shareholders in the case of a hostile takeover, we stated that "associational standing has never been granted in the presence of serious conflicts of interest either among the

members of an association or between an association and its members." Polaroid Corp. v. Disney, 862 F.2d 987, 999 (3d Cir. 1988). We explained the rationale for denying standing to the corporation in that case as follows:

> [A] potential conflict [exist] between those shareholders who view litigation to enjoin a tender offer as adversely affecting their opportunity to collect on the tender offer premium and those shareholders who are cut out of the tender offer and thus may want to see it defeated. Even though some shareholders are disadvantaged by their exclusion from the tender offer, a great majority of shareholders will often benefit from the offer. A corporation is thus an uncertain representative for the interests of the disadvantaged shareholders, as it may have an eye to protecting the interests of the majority. This undermines the basis for jus tertil standing -- that the jus tertil advocate will vigorously assert the interests of the right-holder. See Craig v. Boren, 429 U.S. 190, 194 (1976); Singleton v. Wulff, 428 U.S. 106, 114 (1976) (plurality opinion). Indeed, one basis for the constitutional requirement that a litigant have a personal stake in a litigation is "to assure that concrete

> adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." Simon v. Eastern Kentucky Welfare Right [sic] Organization, 426 U.S. 26, 38 n.16 (1976) (quoting Baker v. Carr, 369 U.S. 186 (1962)).

Id. (emphasis in original).

In Polaroid, we noted two possible conflicts that could prevent a target corporation from seeking standing on behalf of its shareholders. The first is between management, who would seek to defeat the takeover to remain in control, and the shareholders, who could profit from the tender offer. The second conflict is between the shareholders who will profit from the tender offer, normally the majority of shareholders, and the target corporation when the target corporation sides with the shareholders who will not profit from the tender offer,

normally the minority of shareholders. The conflict in our case is of the second type. In the matter at hand, however, the City and Minority Associates do not argue that Contractors are not representing the interests of a majority of their membership. Only twenty-nine of Contractors' 535 members are registered Minority, Female or Handicapped Business Enterprises. Contractors Ass'n, 735 F. Supp. at 1286. There is little chance that the conflict between the majority and minority of the Contractors' members will affect the adequacy of representation or present a likelihood of a collusive suit that would deprive the court of vigorous advocacy on all sides of this dispute. When an association has not violated its members' rights by ignoring the association's by-laws before bringing an

action on a matter of concern to the membership, it is primarily concern over the absence of strong advocacy on both sides of a controversy that has motivated courts to hold that a conflict of interest among its members deprives an association of associational standing. See National Collegiate Athletic Ass'n v. Califano, 622 F.2d 1381, 1391-92 (10th Cir. 1980) (an association cannot have associational standing if more members oppose the association's position than support it); Associated Gen. Contractors of Conn., Inc. v. City of New Haven, 130 F.R.D. 4, 10 (D. Conn. 1990) ("as long as the [law] suit is not in contravention of [the association's] purposes nor its by-laws . . . it has [associational] standing"); Mountain States Legal Found. v. Dole, 655 F. Supp. 1424, 1426 (D. Utah 1987)

("Because associations typically consist of many members with potentially conflicting interests and views on any particular dispute, a danger exists that certain members of the association will be sympathetic to the adverse party. In such a case, there could be no legitimate controversy").[5] The Contractors' position in this litigation is not contrary to the interests of a majority of their members, and there is nothing on this record indicating that they failed to follow their own internal rules before joining this litigation. Therefore, the City's argument fails, and we hold that Contractors[6] have associational standing to maintain the present action.

B.

On the merits, Minority Associates contends that the district court erred in granting summary judgment to the Contractors since Minority Associates did not have enough time to discover evidence it believed was in the possession of the Contractors which would show the existence of past and present discrimination by Contractors against entities that would qualify as Disadvantaged Business Enterprises and so preclude the entry of summary judgment for Contractors under the teaching of City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). Accordingly, it argues that the district court should have delayed ruling on the Contractors' motion for summary judgment until it and the City completed discovery. Minority Associates formally advised the

district court of its need for further discovery in accord with Federal Rule of Civil Procedure 56(f). Rule 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). Whether such a motion should be granted depends, in part, on "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." Lunderstadt, 885 F.2d at 71 (quoting Dowling v. City of Phila., 885 F.2d 136, 140 (3d Cir. 1988)).

In order to examine the first consideration specified in Lunderstadt, what information is sought, we must look

to the affidavit filed with the Rule 56(f) motion. It seeks information from Contractors concerning "past and current practices and/or instances of discrimination by plaintiffs and their members in both the public and private construction industries." II App. at 305. The affidavit also states that Minority Associates plans to seek this information from Contractors through testimony on depositions, interrogatories, and requests for production of documents served on Contractors.

Knowing that information Minority Associates seeks, we turn to the next part of Lunderstadt's inquiry -- whether the information sought, if uncovered, could preclude summary judgment. See Lunderstadt, 885 F.2d at 71. This inquiry into the substantive law on the

constitutionality of minority set-asides is controlled by the Supreme Court's decision in Croson. From the opinions in that case, we must determine whether the information Minority Associates seeks could create a genuine dispute of material fact and so defeat Contractors' motion for summary judgment.

In Croson, a majority of the Supreme Court held that the City of Richmond had not demonstrated a compelling governmental interest that would justify its racially-based set-aside ordinance. Croson, 109 S. Ct. at 723-28. A plurality of the Court also held that the set-aside program violated the Equal Protection Clause of the Fourteenth Amendment because the City of Richmond had not demonstrated that the ordinance was necessary to remedy past discrimination. Id. at 730

(plurality opinion). The lack of record evidence concerning past "discrimination in the local construction industry" was fatal to the ordinance. Id. at 726; see Id. at 723 & 723. The plurality says that this evidence is necessary to the constitutionality of a minority set-aside ordinance. See Id. at 729-30 (plurality opinion). We conclude that the evidence of past discrimination Minority Associates seeks could preclude summary judgment if the City Council's purpose in creating the various set-asides was to remedy such discrimination.

Application of the last Lunderstadt factor requires an inquiry into why the party seeking more time has not previously obtained the information. In its Rule 56(f) affidavit, Minority Associates stated that Contractors had not yet

answered many of the City's interrogatories seeking information Minority Associates needs to formulate its own interrogatories and depositions. Minority Associates also noted that the City's depositions of some of Contractors' members, in which Minority Associates would participate, had been noticed but not taken when the district court granted Contractors' motion for summary judgment. Minority Associates attributes this delay to the Contractors' desire for a protective order and its intent to move for such an order. These reasons are sufficient to explain why the information has not been previously obtained.

Since Minority Associates' request for more time to engage in discovery was for the purpose of seeking information that could defeat a summary judgment

motion, which it could not have previously obtained, under Lunderstadt, its Rule 56(f) affidavit authorized the district court to delay action on the Contractors' motion for a reasonable time.

This conclusion does not, however, end our inquiry. A district court has discretion in acting on Rule 56(f) motions. See Koplove v. Ford Motor Co., 795 F.2d 15, 18 (3d Cir. 1986). The Lunderstadt factors simply offer a guide for a district court to follow in exercising its discretion under Rule 56(f).

In this case, however, the breadth of the district court's discretion is affected by Contractors' possession of records that contain the information Minority Associates seeks. As we said earlier, this limits the district court's

discretion to deny a request for delay when a proper Rule 56(f) affidavit is filed. In such a case, a district court should grant a Rule 56(f) motion almost as a matter of course unless the information is otherwise available to the non-movant. See Ward, 471 F.2d at 670. Here, Minority Associates' Rule 56(f) affidavit avers the information it seeks from Contractors is not otherwise available. Thus, the record before us shows the Lunderstadt factors are present. See Lunderstadt, 885 F.2d at 71. It also demonstrates no undue delay. Cf. Id.

Unanswered interrogatories and notices to take depositions directed to Contractors were outstanding when the district court ruled on Contractors' motion for summary judgment, a practice this Court has disapproved. See Sames v.

Gable, 732 F.2d 49, 51 (3d Cir. 1984). Accordingly, we conclude that the district court abused its discretion when it refused Minority Associates the delay it sought pursuant to Rule 56(f). On remand, Minority Associates should be given a reasonable opportunity to discover evidence that relates to a pattern of discriminatory practices or instances of discrimination in the Philadelphia-area construction industry that occurred over time before passage of the Ordinance.[7] We are confident that the district court will require the Contractors to move promptly for any protective orders they desire and thereafter impose reasonable limits on the scope and time for completion of the discovery Minority Associates seeks.

IV.

The district court abused its discretion in not allowing a continuance before ruling on the pending motions for summary judgment. Consequently, our opinion takes no view on any of the other issues presented in this appeal with the exception that we agree with the district court's holding that the Contractors have standing. Beyond that, we will vacate the order of the district court and remand for further proceedings consistent with this opinion. Each party to bear its own costs.

CONCUR: A. LEON HIGGINBOTHAM, JR., Circuit Judge, concurring in judgment.

I agree with the majority's conclusion and thoughtful opinion that the district court's order should be vacated,

and that further discovery should be conducted. I write separately because in my opinion the majority makes a too premature decision to apply the strictures of City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), in a facial challenge to Chapter 17-500. As will be noted later, the factual matrix and the legislative standards in this case are, in many ways, remarkably different than those involved in Croson. While it is appropriate for the majority to inquire "into the substantive law on the constitutionality of minority set-asides" (Majority Typescript at 14-15), I am not convinced that Croson is concentric with this case, and thus I write to make clear what I think are the significant differences.

In Croson, the Supreme Court set forth the strict scrutiny analysis applicable when a federal court is presented with a challenge to a race-based minority set-aside. Given the standard for summary judgment, I find problematic the fact that the majority might be implicitly assuming that strict scrutiny is applicable to Chapter 17-500. On its face, the ordinance does not assign government benefits according to an individual's race, nor does it require the City to do so. A general policy that permits but does not require unconstitutional conduct is not facially unconstitutional. See, e.g., Cone Corp. v. Florida Dept. of Trans., 921 F.2d 1190, 1209 (11th Cir.), cert. denied, 111 S. Ct. 1190 (1991). I submit that a careful review of the record in this case

demonstrates that there are issues of material fact in dispute concerning whether the Croson analysis should be applied to Chapter 17-500.

For present purposes, strict scrutiny only applies when the government grants a benefit or imposes a burden because of the race of the plaintiff. The majority's semantic approach of placing the word "goals" in quotes and then changing the terminology to "set-aside requirements," see Majority Typescript at 8, is not an adequate analysis of the terms of the challenged ordinance. With all due respect, I submit that the present record cannot by itself support the application of Croson's strict scrutiny analysis to this case. In the words of Justice O'Connor, "this dispute regarding the appropriate standard of review may strike

some as a lawyer's quibble over words, but it is not. The standard of review establishes whether and when the Court and the Constitution allow the Government to employ racial classifications." Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3033 (1990) (O'Connor, J., dissenting).

When presented with an equal protection challenge the first duty of the court is to determine what classifications have been created by the ordinance. Only after that issue is settled can the court determine the level of scrutiny appropriate to the classifications involved and proceed to the merits of the plaintiff's case. See Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 906 n. 6 (1986); Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974); San

Antonio Independent School District v. Rodriquez, 411 U.S. 1, 17 (1973); Dunn v. Blumstein, 405 U.S. 300, 335 (1972). A court cannot merely assume that a suspect classification has been created. See San Antonio Independent School District, 411 U.S. at 19. This determination must be made in light of how the ordinance actually is implemented. In San Antonio Independent School District, both the majority and dissenters recognized that their task was "to ascertain whether, in fact, the . . . system has been shown to discriminate . . . and, if so, whether the resulting classification may be regarded as suspect." 411 U.S. at 20; Id. at 94 ("It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue.") (Marshall, J., dissenting); see

Long v. Saginaw, 911 F.2d 1192, 1198 n.3 (6th Cir. 1989); General Building Contractors Assn., Inc. v. Philadelphia, 762 F.Supp. 1195, 1205 (E.D. Pa. 1991); cf. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 653 (1987) (O'Connor, J., concurring in judgment) (concerning Title VII). The appropriate test is "but for": But for the plaintiff's race, or gender, would he have been disadvantaged by the challenged statute? See, e.g., Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

Of the two relevant provisions in the ordinance, the first adopts goals for City contracting. It was this section of the ordinance upon which the district court based its conclusion that Chapter 17-500 creates suspect classifications. On the

summary judgment record, the district court concluded that these goals were being implemented as set-asides, and that therefore strict scrutiny was warranted. Although it is unclear, it is apparently this section of the Ordinance that the majority relies upon to justify its application of Croson to Chapter 17-500. However, because this provision merely set goals and requires no action on the part of the City, this provision does not create any rights on the part of the minority owned firms or any responsibilities owed those firms by the City. This provision, on its face, therefore, does not trigger strict scrutiny, in contrast to the Richmond Plan considered in Croson.

Of equal importance is the fact that when ruling upon a facial challenge to a

statute, a court must consider any limiting construction a state or municipality has placed on a law, including any administrative interpretation and implementation of that law. See Ward v. Rock Against Racism, 109 S. Ct. 2746, 2756 (1989); Hoffman Estates v. Flipside, 455 U.S. 489, 494 n.5 (1982); Hotel & Restaurant Employees & Bartenders Int'l. Union v. Read, 832 F.2d 263, 268 (3d Cir. 1987); Trade Waste Management Assoc. v. Hughey, 780 F.2d 221, 236 n.6 (3d Cir. 1985): "it is the procedures followed . . . which are at issue, since 'the courts will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it cannot be applied consistently with the Constitution.'" (quoting Robinson v. New

Jersey, 806 F.2d 442, 446 (3d Cir. 1986), cert. denied 481 U.S. 1070 (1987)).

The cornerstone of the Contractors' argument is that the 15%, 10%, and 2% figures constitutes the operative section because they allegedly set a rigid quota, or even floor, for the participation rate of the groups to which they apply. The Contractors conclude that because only minorities, women, and handicapped individuals are listed as qualifying for a percentage, this quota is race, sex, and handicapped based. However, as the parties made clear at oral argument, there is a material issue of fact in dispute over which section is the so-called "operative" section of the ordinance.

At oral argument before this court, the City contended that "the goals do not require participation at these levels,

they are goals for measuring the success of the Affirmative Action Program. They don't require that there be fifteen percent minorities or ten percent female . . . . they are really goals for measuring the program." Transcript of Oral Argument 15-16. The City's argument is supported by testimony given at council hearings when the handicapped goals were being discussed. At issue was whether the five percent goal for contracts awarded to the handicapped would, in practice, be a goal or a quota. As the discussion reveals, the Procurement Office does not oppose the five percent goal in the ordinance because it would function as a goal, just as the percentages for Minority Business Enterprises ("MBEs") and Female Business Enterprises ("FBEs") did. Mr. Curtis Jones, from the Minority Business

Enterprise Council, asked whether the handicapped provisions "fall under the same provisions within 17-500 which allow for a waiver process, which allow for us to adjust and amend on a contract-by-contract basis. Is that true?" He then described the system used for MBEs and FBEs: "If we have that system as a part of this goal, then we can make adjustments based on a fair review to see if there was a good-faith effort made by prime contractors to achieve the goals. So if we are talking about using the same mechanics that we do to administer for minorities and females . . . ." The answer was yes.

Jones then responded "then I'm comfortable with what we call a goal. It's not a quota; it's a goal." IVB at 755-57 (emphasis added). The conclusion

that the Disadvantaged Business Enterprise ("DBE") percentages were acting as goals and not quotas was also borne out by a statement of Councilperson Specter: "And we may not be able to reach that goal the first year, as we did not with minorities and women. But every year we come closer and closer to those goals." IVB at 750. In addition, there was specific evidence that the percentage used to gauge the participation of women does in fact work as a goal, not a quota: "Let's look at the female category entrepreneurs as an addition to the minority component. What we found was that that was very difficult to achieve. We've come in in about the neighborhood of a little better than eight percent overall." IVB at 760.

Under the standard for summary judgment, these colloquies create an

inference that the City did not apply the ordinance inflexibly, and in fact distinguished the DBE goals from a quota system. This record creates a triable issue of fact over whether the percentages create a quota system or merely goals in Philadelphia. If the percentages do not fix any amount of the work to be allocated, then no right of the Contractors is infringed.

Indeed, in Croson, the issues of goals and flexibility were of paramount importance.

The Richmond Plan denied certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" . . . are implicated by a rigid rule erecting race as the sole

criterion in an aspect of public decision making. 488 U.S. at 493 (emphasis added). The Court also noted that the Richmond Plan employed a "rigid racial quota," id at 499, and that the effect of the plan was to "apportion public contracting opportunities on the basis of race." Id. at 505. The court noted that in the public contracting milieu, "it is difficult to see the need for a rigid numerical quota." Id. at 508 (emphasis added). In the present case, there is a material issue of disputed fact concerning whether a quota has been created, and a concomitant disputed issue over whether Croson is applicable.

I also note that even if the goals do parcelout contracts on the basis of disadvantage status, there is a material issue of disputed fact over whether the

classification "disadvantaged status" triggers heightened scrutiny. There is a disputed issue of material fact over whether, under the definition of disadvantaged," only minorities, women, and handicapped can ever be granted preferred status." I App. at 270. The City introduced an affidavit from the Executive Director of the MBEC that stated: "Any disadvantaged member of Plaintiff organizations . . . who are disadvantaged are eligible for certification as a DBE without regard to their race, gender or physical capability. The MBEC considers economic and social factors in addition to race and gender in determining whether an applicant should be certified as a DBE." II App. at 286 (emphasis added). Giving the City the benefit of reasonable inferences, as we

must on a motion for summary judgment, the record reveals that the intent of the council was to conduct an "investigation regarding the financial background of applicants to ensure that they are both socially disadvantaged and economically disadvantaged in terms of their history." IVB App. at 536-37. As discussed above, the City has introduced uncontroverted evidence, by affidavit, that this is actually how the chapter is administered. See also II App. at 364 (statement of Blackwell, not considered by the district court, that the ordinance was not intended to, and does not apply to, MBEs or FBEs that are not disadvantaged). The language of the ordinance supports this interpretation, and there is no evidence in the record to the contrary. In short, even assuming that the goals do in fact

allocate city contracts, a conclusion this record does not dictate, if the City is correct in its assertion that the classifications merely distinguish individuals along economic and sociallines, the ordinance should only be reviewed under the traditional rational basis test. See Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973).

We are obligated to view the record in the light most favorable to the City. See Colgan v. Fisher Scientific Co., No. 90-3659, slip op. at 40 (3d. Cir. June 19, 1991) (in banc). The majority's implicit assumption that the Croson strict scrutiny analysis applies to the Ordinance constitutes a resolution of disputed facts that goes right to the heart of whether strict scrutiny is warranted in this case.

See Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2980-81 (1990); see also Id. at 2981 ("The Court of Appeals should not have invalidated the . . . statute on a facial challenge based upon a work-case analysis . . . ."). The state of the record below should leave us uncertain of the applicability of Croson to Chapter 17-500. I would hold that summary judgment on the question of the standard applicable to the goals section of Chapter 17-500 was inappropriate based on the record below.

The second relevant section provides that if a city agency appears unable to meet the goals, "the MBEC may request that the agency furnish to it a compliance plan . . . ." If the MBEC concludes that the compliance plan is insufficient, "the MBEC may recommend that the agency revise its

plan . . . . Such recommended revisions may include" the sheltered market. (II App. at 317 (emphasis added).) This provision, the sheltered market provision, is the only section of the ordinance that, on its face, has the potential for parceling out city contracts on the basis of race, gender, or handicap status, and for therefore triggering heightened scrutiny. In order for the City to defeat a facial challenge to the Ordinance, it needs "merely to identify a possible" valid application of the challenged statute. Baltimore & Ohio R.R. Co. v. Oberly, 836 F.2d 108, 116 (3d Cir. 1988). Chapter 17-500, however can be applied in a manner that does not trigger heightened scrutiny, i.e., whenever the sheltered market is not used.

However, I do not believe that issue must be reached; under no set of circumstances is the City compelled to use the sheltered market. On its face, the ordinance contemplates many applications without resort to the use of a sheltered market, does not require the use of a sheltered market, and permits the use of the sheltered market only on a case by case basis. Obviously, the use of the sheltered market should be subject to heightened scrutiny, but because the ordinance permits the use of the sheltered market only on a case by case basis, such a challenge must come as an applied, not a facial, challenge. The majority overlooks the dictates of United States v. Salerno, 481 U.S. 739-745 (1987), and Hoffman Estates v. Flipside, 455 U.S. 489, 494 n.5 (1982), that a statute may only be

invalidated on its face if it is incapable of any valid application. Thus, summary judgment is in favor of the Contractor should not have been granted on this record.

Corp:Whr1634

[1] The collective term "Contractors" means Contractors Association of Eastern Pennsylvania, Incorporated; General Building Contractors Association, Incorporated; Employing Bricklayers Association of Delaware Valley, Incorporated; and Subcontractors Association of Delaware Valley, Incorporated. These four are those plaintiffs the district court held met the standing requirements of Article III of the United States Constitution. See Contractors Ass'n of E. Pa., Inc. v. City of Phila., 735 F. Supp. at 1283-84 & n.3.

[2] After oral argument, this Court received supplemental briefing from the parties in April and May of 1991.

[3] The class of "socially and economically disadvantaged individuals" is defined as follows:

Footnote continued on next page.

Footnote continued from previous page.

> (11) Socially and Economically Disadvantaged Individuals shall mean those individuals who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.
>
> (a) In determining who are socially and economically disadvantaged individuals, the Minority Business Enterprise Council may make a reputable presumption that all minority persons, all women and all handicapped persons shall be so classified.
>
> (b) The Minority Business Enterprise Council, in making said determination, shall also consider, among other things the extent of the liquid assets and net worth of such socially disadvantaged individuals.

Id.

[4] In Rocks v. City of Philadelphia, 868 F.2d 644, 648 (3d Cir. 1989), this Court

Footnote continued on next page.

Footnote continued from previous page.

held that municipal taxpayers did not have standing to challenge Chapter 17-500 absent a showing that they had "sustained a proximate, individual and addressable injury, based solely on their status as municipal residents and taxpayers," but in dicta, stated that: "Contemplating the appellants' allegation, we think that an article III injury to contractors and bidders at large has been made out." This supports, but does not compel, our result.

5 The United States Court of Appeals for the District of Columbia Circuit has rejected the theory that an internal conflict of interest may deprive an organization of standing. See Humane Society of the United States v. Hodel, 840 F.2d 45, 59-60 (D.C. Cir. 1988); National Maritime Union v. Commander, Military Sealift Command, 824 F.2d 1228, 1234 (D.C. Cir. 1987).

6 The reader is reminded that the term "Contractors" as used in this opinion encompasses all the trade associations that joined in bringing this action who were found to have met Article III's requirements for standing by the district court. See supra note 1.

[7] Though Minority Associates may also compile and submit evidence of instances of discrimination that pre-date the passage of the Ordinance, we note that the questions of whether evidence of past discrimination not known to City Council when it passed the Ordinance is proof material to the legislative purpose of correcting such discrimination that Croson requires, or whether anecdotal evidence of discrimination is sufficient to show the compelling interest Croson requires are not now before us.